UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
X----------X

JONATHAN NNEBE, ALEXANDER KARMANSKY, EDUARDO AVENAUT, KHAIRUL AMIN and the NEW YORK TAXI WORKERS ALLIANCE, individually and on behalf of all others similarly situated,

Plaintiffs,

06-CV-4991 (KMK)(AJP)

-Against-

MATTHEW DAUS, CHARLES FRASER, JOSEPH ECKSTEIN, ELIZABETH BONINA, THE NEW YORK CITY TAXI AND LIMOUSINE COMMISSION, AND THE CITY OF NEW YORK,

Defendants.

X----------X

MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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May 29, 2007

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Preliminary Statement

The New York City Taxi and Limousine Commission (TLC) enforces an unwritten rule by which it suspends the licenses of taxi drivers based on the mere fact that the cabbie has been arrested. After the suspension, the TLC offers the cabbie a putative "hearing" to determine whether that suspension should be continued. Even then, the TLC's handpicked judges disregard the facts and circumstances of the arrest and "recommend" in virtually every case that the suspension be continued. The TLC Chairman accepts the so-called recommendations without fail. Everyone concerned—the TLC, the TLC judges, and the Chairman—studiously disregards the substance of the allegations and does not inquire even if the arrest occurred while the cabbie was on duty. In short, the TLC suspends first and asks questions later—and then ignores the answers.

This policy and practice violates due process in several distinct ways, abandons the presumption of innocence, and defies state law.

The TLC's unwritten policy deprives cabbies of their livelihoods, yet is unsupported by any legal authority. Defendants can cite no statute, no ordinance, no rule—in short no law—that authorizes or even mentions automatic suspension based on an allegation alone. It is fundamental, however, that an administrative agency may not act without legislative authority. This rule was well-stated by Justice Rehnquist, writing for a unanimous Supreme Court in *Securities and Exchange Comm'n v. Sloan*, 436 U.S. 103 (1978), a case involving the suspension of securities trading: "[T]he power to summarily suspend … even for 10 days, without any notice, opportunity to be heard, or findings based upon a record, is an awesome power with a potentially devastating impact …. A clear mandate … is necessary to confer this power." *Id. at* 112.[1] Justice Stevens, writing for the Court in *BMW of North America, Inc. v. Gore,* placed this principle on constitutional footing, writing: "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." 517 U.S. 559, 574 (1996). Finally, the TLC denies even that "fundamental requirement of due process … the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

The TLC policy disregards these essential principles. Suspended cabbies receive no prior notice of either the conduct barred or its consequence. The post-suspension

[1] Sam Sloan, the *pro se* respondent in *SEC v. Sloan*, later became a New York City taxi driver. *See* Wikipedia: http://en.wikipedia.org/wiki/Sam_Sloan.

hearings offer no opportunity to mount a defense. The policy violates the New York City Charter, the New York City Administrative Code, and the TLC Rules. Above all, and in a variety of ways, the policy violates the Due Process Clause of the Constitution. In short, the policy is illegal in almost every way imaginable. Nevertheless, the TLC admits to suspending 1400 yellow cab drivers in a three-year period, and even more for-hire-vehicle drivers (drivers of so-called black cars and livery cabs). *See* Exh. 8 (TLC Suspension Count). And the agency persists despite knowing that, at the end of the day, an overwhelming percentage of the arrested cab drivers are exonerated.

Suspending a taxi driver without a hearing—and indeed without any knowledge or consideration of the facts—violates due process. Even if a post-suspension hearing were sufficient, there would still be a constitutional violation because the TLC's post-suspension hearings are shams, their outcomes pre-ordained. Indeed, the entire TLC administrative law system is unconstitutionally biased because the way the judges are hired, fired, promoted and supervised promises a pronounced pro-agency tilt.

Plaintiffs bring this action individually and on behalf of more than a thousand others similarly situated pursuant to 42 U.S.C. § 1983, the City Administrative Act, the NYC Administrative Code, and TLC Rules. We seek injunctive and declaratory relief and compensatory and punitive damages. All such relief may be awarded on summary judgment as the relevant facts have all been admitted by the individual defendants and by TLC officials.

STATEMENT OF FACTS

1. The Void in Legal Authority

At various times, the TLC has claimed legal authority to suspend in either the New York City Administrative Code or the TLC Rules. Otherwise, defendants claim authority based on necessity or defendants' free-floating desire "to promote public's confidence in TLC's ability." Def. Memo Opp. Prel. Inj. at 18. But sanction to suspend exists, if at all, in the City Charter, in the Administrative Code, or in TLC Rules. In fact, no law permits automatic suspensions upon an arrest alone.

While there is a general statute and a general rule concerning summary suspensions, neither mentions arrests as a basis for agency action. Moreover, both the statute and the rule require a finding that emergency action is necessary. The TLC simply ignores these provisions. Despite the absence of lawful authority, the agency exercises this "emergency" power on a daily basis, summarily suspending hundreds of taxi drivers annually.

A. The City Charter

The TLC, a creature of the City Charter, is a nine-member commission. City Charter § 2300. The Charter provides: "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. *See, generally, Padberg v. McGrath-McKechnie*, 203

F. Supp. 2d 261, 267-68 (E.D.N.Y. 2002), *aff'd* 2003 U.S. App. LEXIS 4618 (2d Cir. 2003), *cert. denied*, 540 U.S. 967 (2003). Despite the clear language of the Charter, the TLC executive pursues its automatic suspension policy without the advice or consent of the commission. The commission never passed the TLC's unwritten policy by majority vote as there was no vote. (Pertinent Charter sections are annexed as Exh. 1.)

B. The Administrative Code

Defendants may claim their conduct is allowed by statute. It is just not so. The Administrative Code, enacted by the legislature, does provide specifically for the suspension of a cab driver who, for example, twice violates the rule against service refusals (a 30-day suspension) or who accumulates six points on his license (also 30 days). *See* Admin. Code §§ 19-507(b). The code (§ 19-512.1) does provide that "the commission" may summarily suspend a taxi license "for good cause shown relating to a threat to the public health, or safety." (Pertinent Code sections are annexed as Exh. 3.) But there is no statement or implication that an arrest is a substitute for the required commission finding. There is no mention of automatic suspensions in the legislative history either. *See* Exh. 6.

The TLC ignores the code requirements. It is undisputed that the commission is never consulted on suspension rulings and that it makes no finding whatsoever. The TLC lawyer who does issue the orders likewise makes no "good cause" finding. Hardekopf 13-14; Fraser 108-19.[2] No one does. In short, the TLC entirely disregards the procedural and substantive protections of the law—and then it claims to rely on it.

[2] Deposition testimony is identified by deponent and page number. Pertinent excerpts are attached as exhibits to the Declaration of Daniel Ackman dated May 29, 2007.

C. TLC Rules

The Administrative Code permits the Commission to "promulgate such rules and regulations as are necessary to exercise the authority conferred upon it by [the Code] and to implement the provisions." Admin. Code § 19-503(a). This power, in accordance with the hornbook administrative law, is limited by the Code itself. The Code says so specifically in § 19-503(b):

> No rule or regulation promulgated subsequent to the effective date of this local law may be inconsistent with or supersede any provision of this local law and any rule or regulation in effect on the effective date of this local law that is inconsistent with any provision of this local law shall be of no further force and effect.

Exercising its authority, the Commission (like the City Council) has enacted rules that provide for the possibility of suspension in many instances. These instances include 30-day suspensions for leaving the scene of an accident (Rule 2-21C), failing to be listed on the taxi's rate card (2-24C) or smoking in the cab (2-25C). (Pertinent TLC Rules are annexed as Exh. 4.)

Of course, TLC rules authorize these suspensions for specific and limited durations only *after* a cabbie is convicted of a specified offense. By contrast the TLC's automatic suspensions upon arrests were never authorized by the TLC commissioners, are based purely on allegations, and they are for an indefinite duration. Indeed, there is no dispute that until December 2, 2006, after this action was filed, there was never any rule saying that a hack license could be or should be suspended based solely on an arrest.

The only TLC rule (before December 2006) that does mention summary suspensions is TLC Rule 8-16. It provides:

> §8-16 Emergency Suspension to Protect the Public Welfare.
> (a) If the Chairperson finds that emergency action is required to insure public health, safety or welfare, he/she may order the

> summary suspension of a license or licensee, pending revocation proceedings.
>
> (b) Such revocation proceedings shall be initiated within five (5) calendar days of the summary suspension.

In fact, defendants concede that the chair makes no finding, that no one else at the TLC makes any such finding, and that revocation proceedings are not initiated within five days. Indeed, since the overwhelming majority of drivers suspended later have the criminal charges dropped, there are rarely grounds for revocation apparent within five days—or ever. In any event, there is no TLC rule that permits or requires a taxi driver's license be revoked upon *conviction* of a crime.

D. City Administrative Procedure Act

Like all city agencies, the TLC is governed by the City Administrative Procedure Act (CAPA). Part of the City Charter, CAPA defines both how agencies may enact rules and how they may conduct adjudicative hearings. On rulemaking, CAPA § 1043 requires public notice and comment before any new rule or rule change. This provision applies not just to rules labeled as such but to (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). The TLC, in enforcing an unwritten, unpublished rule, violates this provision. (The text of CAPA is at Exh. 2.)

As to agency adjudications, CAPA requires, "Except as otherwise provided for by state or local law, the party commencing the adjudication [that is, the TLC] shall have the burden of proof." § 1046(c)(2). The statute 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."

CAPA § 1046(c)(1). It also mandates that agency ALJs perform only adjudicative duties. Finally, it requires that agency hearings comport with due process of law. CAPA § 1046(c). For reasons to be discussed, the TLC's unwritten automatic suspension policy violates CAPA in several respects. The agency never published a rule. It never allowed for public comment. It routinely advises its judges in an *ex parte* manner. Its hearings fall far short of due process requirements and the agency never even attempts to carry its burden of proof.

2. The TLC's Pattern and Practice

Automatic Suspensions: Pursuant to policy, the TLC routinely suspends cabbies arrested on certain charges, without knowledge of the circumstances of the alleged crime or concern for the cabbie's prior record. Hardekopf 26-28. The decision to suspend is made not by the commissioners or by the chairman, but by Marc Hardekopf, a junior TLC lawyer, who works off a list of charges. Fraser 110; Mazer 9-10. The allegations that may lead to automatic suspension apparently have changed from time to time. But the list of charges that may trigger suspension has never been made public. Hardekopf 88; Fraser 113-15. Indeed, the list has never been shown to the TLC Commissioners or to the TLC's own judges. Fraser 123; Hardekopf 41; Bonina 126; Fioramonti 34. Indeed, the last time Mr. Hardekopf and the TLC General Counsel adjusted the list, the evidence indicates they never even consulted Chairman Daus.[3]

Mr. Hardekopf acts upon receipt of a computer-generated notice of the arrest. Hardekopf 12. The notification lists sections of the penal code, but gives no information

[3] Around November 2006, well after this action was filed, the list of offenses was amended by Mr. Hardekopf and Mr. Fraser. Mr. Fraser testified he also consulted with Chairman Daus, but the chairman testified he played no role. Fraser 117; Daus 173. Everyone concedes the list has never been made public and that the commissioners took no part in its formation. Fraser 117-18, 123.

about what allegedly happened. *See* Exh. 9. In ordering the suspension, Mr. Hardekopf does not know or consider the facts or circumstances underlying the criminal allegations. He does not consider whether criminal charges have been filed in court. He does not review or consider the cabbie's prior record (whether as a taxi driver or as a citizen). He does not review the cabbie's personal history (such as whether he has a family to support). He does not ask if the cabbie has a defense or whether he denies the charges. He does not inquire whether the alleged crime occurred while the taxi driver was on duty. Hardekopf 26-28. In short, he knows nothing and considers nothing about whether there is good cause for the suspension (as required by the Admin. Code) or whether emergency action is necessary (as required by the TLC Rules). And of course, he acts without consulting the commissioners or the chair. Hardekopf 13-14; Daus 53-54; Fraser 108-110.

Earlier in this action, defendants claimed that the chairman "delegated" his duty to the TLC legal department. There is nothing in the record indicating any such delegation. Asked when this alleged delegation occurred, Mr. Daus testified: "I don't recollect exact dates or the exact form, but anyone who's been working there could basically tell you that it's been that way for a while." Daus 29. He later added:

> I'm telling you I don't recall any conversations, communications, memos, anything of that nature. The only thing I remember and I think it is clear, that they've been given at some point in time the discretion to decide whether to suspend or not based upon factors that are within their discretion to basically comply with the rules and the administrative code. Daus 61.

For his part, Mr. Hardekopf signed a declaration saying that the TLC Chairman had delegated authority to the legal department. He later admitted at a deposition he did not know if that was true. Hardekopf 17-18.

Sham Hearings: Sometime after the automatic suspension, the TLC offers the cabbie an opportunity to appear before a TLC administrative law judge for a "hearing." The supposed purpose of such hearings is to determine whether the suspension should be continued while criminal charges are pending. In fact, the TLC judges—as directed by supervisory ALJs and by the TLC ALJ Manual, an *ex parte* document—recommend continuation in every case—with one telling exception.

A taxi driver may testify at a post-suspension hearing, but many (indeed most) choose not to on advice of counsel because lawyers representing taxi drivers have come to know that the hearings are rigged and meaningless. Spevack Decl. dated June 30, 2006 ¶ 5 at Exh. 25; *see also* Declarations of M. Parker, I. Godinger and S. Chohan at Exhs. 26-28. TLC judges assume the criminal charges are true regardless of the facts or the cabbie's defenses or denials. Fraser 37. They require no evidence apart from the computer-generated arrest report. Fioramonti 43; Coyne 161; Fraser 178-79. Like the lawyer who orders the suspensions, they give no weight to the factors that might determine if the cabbie is a threat to public health or safety. They do not consider the cabbie's driving record, his criminal history (or lack thereof), his family background, or the credibility of his accusers. Nor do they care whether the alleged offense occurred while the cabbie was working. Fioramonti 25-27; Coyne 53-56.

Indeed, Michael Spevack, a longtime lawyer for taxi drivers, affirmed that "If a taxi driver wants me to represent him at a summary suspension hearing, I generally decline since I do not feel it proper to accept money to act at a hearing where the result is not in doubt." Exh. 25 ¶ 5. That perception is completely accurate. In the course of discovery, defendants produced 228 summary suspension recommendations by TLC

judges. In every case (except three decisions by Eric Gottlieb) the ALJ recommended continuing the suspension. Decl. of Daniel Ackman Decl. dated May 29, 2007 ¶ 3.

The uniformity of the recommendations has long been a matter of secret TLC policy: TLC judges had (and still have) no discretion to rule in favor of the suspended cab driver at the so-called hearings. After much waffling and deception, this fact was finally admitted by Thomas Coyne, the Deputy Chief ALJ in charge of so-called "fitness" hearings in an e-mail to Amy Bann (a TLC lawyer). (Summary suspension hearings are a species of fitness hearing.) In an internal e-mail he sent to TLC Deputy Commissioner J. Eckstein dated April 3, 2006, Mr. Coyne states flatly that "the **policy** of the TLC was [to deny the TLC judges discretion]" at post-suspension hearings. He adds that he "**trained**" the ALJs to follow this *de facto* policy. E-mail from Coyne to TLC Deputy Commissioner J. Eckstein dated April 3, 2006, Exh. 12 (emphasis in original).[4] Tellingly, these e-mails were not even produced during the normal course of discovery, but were withheld until May 7 (two months after the close of discovery). Even then, defendants refused to turn them over until plaintiffs prevailed on a motion to Judge Peck and on appeal to Judge Karas. Previously, Mr. Coyne and Elizabeth Bonina, the Chief TLC ALJ, had testified they were applying a "standard" laid out in the TLC ALJ Manual, but not in any TLC rule or city statute. Coyne 34-35; Bonina 59-62. This standard, of course, tells the judges to assume guilt and consider nothing else and assured that the TLC prevailed every time. Coyne 42; Bonina 75-76; *see also* the TLC Manual, Exh. 20.

[4] At his deposition, however, Mr. Coyne testified to the contrary, saying ALJs did have discretion to lift the suspension, even if none but Mr. Gottlieb had ever done so. Asked about TLC policy, he claimed he did not understand the meaning of the word. He did, however, concede that he had never seen the automatic suspension policy in writing, that he did not know when the policy was initiated or who initiated it, and that he had no idea if the commissioners voted on it. Coyne 24-25, 28-29, 142, 170.

Mr. Coyne's April 3 e-mail was in reaction to the rulings by TLC ALJ Eric Gottlieb. The rulings were unique because Mr. Gottlieb was the only TLC ALJ in memory who ruled in favor of a taxi driver at a summary suspension case. Mr. Gottlieb's three recommendations were issued at the end of February and the beginning of March 2006. See E-mail from Gottlieb to Coyne dated April 13, 2006, Exh. 13. When Mr. Coyne got wind of these rulings, he called Mr. Gottlieb two or three times and had Chief ALJ Bonina call as well. Coyne 77-78. Mr. Coyne then sent an e-mail (dated March 22) in which he notified Mr. Gottlieb that his decision was "**improper**." (emphasis in original). Mr. Coyne adds: "Re-read the ALJ Manual…. In the future if you believe a summary suspension should be lifted please call me and discuss the matter before mailing it out." In response, Mr. Gottlieb apologized for his decisions—a "mishap," he called it—and said he would never rule in a cabbie's favor again. E-mail from Gottlieb to Coyne dated March 28, 2006; Gottlieb 69. Mr. Gottlieb kept his promise and thereafter ruled in lockstep with the other TLC judges. Gottlieb 70.[5] If the ALJs could only rule one way, "There is no point to having a hearing," Mr. Gottlieb later testified. Gottlieb 91. He left the agency soon after. Gottlieb 98.

Mr. Gottlieb's "mistake" was that he applied Rule 8-16 as written and enacted by the commissioners. Mr. Coyne ordered he instead impose the "standard" set forth by the ALJ Manual (a non-public document) per Mr. Coyne's training. It is worth noting, that Mr. Gottlieb proved prescient in his pro-cabbie rulings. He noted in all three cases that the taxi driver's record was good. He noted in two cases that the cabbies had been given Desk Appearance Tickets rather than having been jailed and arraigned right away. (This also

[5] Later on, Deputy Chief Judge Coyne reprimanded Mr. Gottlieb for not putting sufficient detail in his recommendations—as if Mr. Daus ever asked about or ruled based on the details. Exh.

meant that no assistant district attorney had been assigned, so there was no way for either the TLC or the cab driver to communicate with a prosecutor.) In another case, he noted that the cabbie was arrested concerning a domestic dispute, but not until 38 days after the alleged incident. Mr. Gottlieb found that the "overwhelming likelihood" was a non-criminal disposition. *See* Gottlieb Decisions at Exh. 14. In all three cases, he was correct: The criminal charges were dropped. Twice, the charges were dismissed even before Matthew Daus had a chance to reject Mr. Gottlieb's recommendation. *See* TLC Activity Logs at Exh. 15.

Even before Mr. Gottlieb had a chance to respond to Mr. Coyne, the deputy chief ALJ was taking the matter up with Mr. Hardekopf, the primary prosecutor at summary suspension hearings. (At the time Mr. Coyne called, Mr. Gottlieb was with his wife in the hospital and not receiving messages. Gottlieb 52.) In a March 22 e-mail, Mr. Coyne tells Mr. Hardekopf: "I think you **fail** to realize that Gottlieb did not abide by our current summary suspension rules concerning arrests." (emphasis in original). "If the ALJs **now** have the authority to lift summary suspensions then this change should be in writing since it conflicts with the ALJ manual and my understanding of current policy." Exh. 16. In other words, hearings were rigged. If that was changing, Mr. Coyne wanted to know about it.

Mr. Coyne then sought clarification from Charles Fraser, the TLC's general counsel. In a March 31 e-mail to Amy Bann, a lawyer who works for Fraser, Mr. Coyne asked, "[D]o the ALJs have the discretion to recommend that a summary suspension be lifted…?" Mr. Fraser replied that the ALJs do have discretion, "however he was not going to put that in writing." April 3 E-mail from Coyne to Eckstein, Exh. 12.

Mr. Coyne, however, either rejected Mr. Fraser's advice or failed to relay the message. The ALJ recommendations after March 31 2006 are no different from those that came before. Even Mr. Gottlieb got with the program and, like the other ALJs, unfailingly recommended the automatic suspensions be continued. Ackman Decl. ¶ 4; Gottlieb 70-71.

The Coyne e-mails were produced after the end of discovery. They were withheld despite the fact that defense counsel admitted she had the e-mails in her possession. Letter from O'Sullivan to Ackman, Exh. 17. Then, late in the day, defendants claimed that these e-mails were all privileged. (The Coyne-Gottlieb e-mails were produced by Mr. Gottlieb.) Plaintiffs received the e-mails well after the depositions of Mr. Coyne, Mr. Fraser and Mr. Hardekopf. With or without deposition testimony, the e-mails are speak for themselves: TLC judges had no discretion. The post-suspension hearings were phony. Had their cover not been blown, defendants might still be arguing that taxi drivers could receive a genuine post-suspension hearing. With these admissions and the uniform outcomes, there can be no dispute.

The Chairman's Rubber Stamp: The Chairman accepts the judge's recommendation virtually every time. Indeed, the same TLC lawyers who prosecute also the cases draft the decisions for the chairman's signature. Daus 127-28. Matthew Daus testified: "I basically read the [TLC] judge's decision. I read any comments that are submitted, and I make a decision as to whether continuing the suspension is in accordance with the rules...," adding he decides on "a case-by-case basis." Daus 94. In fact, the chairman exercises his "discretion" the same way in every case. Unless, of course, the TLC judge slips up and rules in favor of the cabbie—then Matthew Daus

overrules the judge. See Exh 19.[6] The chairman's decision is final—there is no appeal to the TLC Commissioners. *See* Letter from Mary O'Sullivan to the Court dated Nov. 22, 2006 (correcting the Court's "error"). Exh. 18. Despite the fact that the TLC Rules require a finding of "emergency" by the chairman, Mr. Daus is not even informed about suspensions until after the fact, if ever.[7] Daus 20-22; Fraser 110.

In the end, none of the TLC officials involved—not the lawyer who orders the suspension, not the TLC judge who "reviews" it, and certainly not the TLC chairman who approves it—contemplates the circumstances or severity of the crime alleged. All they know (or care) about is whether the driver has been arrested and that the offense charged is on a private list prepared by and for a few TLC lawyers. Hardekopf 9-12; Fraser 117-119.

3. The Overwhelming Likelihood of Exoneration

The TLC—or, more accurately, the executive arm of the TLC— has persisted in its policy despite the fact that the odds are overwhelming that the drivers it suspends will be exonerated of the criminal allegations that trigger the suspension in the first place. The facts produced in the course of discovery place this conclusion beyond doubt. A review by counsel of a random sample of TLC case files indicates that more than 90% of the individuals suspended later see their criminal charges dismissed, reduced to a violation, adjourned in contemplation of dismissal, or not-prosecuted at all. Ackman Decl. ¶ 4. All

[6] Ackman Decl. ¶ 4. Matthew Daus testified that he lifted a summary suspension once (or perhaps twice) "in recent memory." But he could not recall the name of the cab driver or anything else in particular about the case that would allow defendants to find the relevant document. Daus 83-87. No such document has come to light. There is also no dispute that this was a one-chance-out-of-a thousand event— if it ever happened at all. Chairman Daus did, however, reject the one pro-driver recommendation that came before him, that of Mr. Gottlieb. Exh. P.

[7] In many cases, the criminal matter is resolved before Mr. Daus gets around to ruling—on average about a month after the ALJ recommendation. Ackman Decl. ¶ 7.

of the named plaintiffs, likewise, saw their charges dismissed. While this statistic is based on counsel's review of the TLC suspension files, the TLC has the same records and knows the facts. Indeed, Mr. Hardekopf admitted that the percentage of drivers who are convicted is "very low." Hardekopf 61. This is true for the entire class period.

4. The Mysterious Origins of the Unwritten Rule

It is more than a little strange that no TLC official will take credit for enacting the unwritten automatic suspension rule. Indeed, no one seems to know who enacted it or how. Matthew Daus, a ten-year veteran of the agency, who was general counsel before he became chairman, testified, "I don't know. I don't remember." Daus 30. Mr. Fraser, the current general counsel, testified he did not know when the rule was enacted or who enacted it. Fraser 73-74. Mr. Hardekopf, the lawyer who orders the suspensions, was also unaware. Hardekopf 6. Andrew Salkin, the first deputy commissioner, testified he heard about the practice from a friend when he joined the agency in 2004, that he discussed it with the Taxi Worker's Alliance early in his tenure, but that he never saw it in writing and does not know who passed it. Salkin 45-49. Mr. Coyne testified he found the "standard" to be applied in the TLC ALJ Manual, but he did not know who wrote the relevant section—though he was certain he did not write it. Coyne 133-34. One thing is clear, however, that until December 2006, there was no written TLC rule (there is still no statute) authorizing or mentioning summary suspensions based on an arrest.

5. The TLC's New Rule

Effective December 2, 2006, the TLC enacted Rule 8-16C, which, for the first time, provides for summary suspension in response to an arrest. The new rule adds the

"standard" previously found only in the non-public ALJ Manual. *See* Exh. 20.[8] By this enactment, the TLC effectively admits that its action requires a rule passed in a lawful manner. But even in 2006, the TLC executive was not exactly honest or forthcoming. Indeed Mr. Fraser advised the commissioners that the TLC only exercises this power for "serious crimes."[9] *See* Fraser statement at TLC Public Meeting on Oct. 25, 2006, transcr. 111, Exh. 21. In fact, most of the suspensions are for misdemeanor arrests. He earlier told the commissioners that they suspend only where the Chairman "review[s] the charges and determine[s] to suspend." *See* Fraser statement at TLC Public Meeting on April 4, 2006, transcr. 80, Exh. 22. In fact, as Mr. Fraser well knows, the chairman never reviews the charges and never makes any such determination. Finally, no one from the TLC executive informed the commissioners, that the "new" Rule 8-16C was actually an old (but unwritten) rule. This omission is despite the fact that Mr. Fraser and Mr. Daus admitted that the new rule did not change the TLC's existing practice at all. Daus 32-33; Fraser 236-37.

6. The TLC's At-Will, Per Diem Judges

The TLC judges who adjudicate at post-suspension hearings are at-will employees of the agency. They work on a per-diem basis and enjoy no tenure or term in office and no contractual or civil service protections. Coyne 40-41; Bonina 71-73. ALJs must apply for work assignments on a monthly basis, and those assignments may be denied.

[8] New TLC Rule 8-16C provides: "At the hearing pursuant to subdivision (e) of this section, the issue shall be whether the charges underlying the licensee's arrest, if true, demonstrate that the licensee's continued licensure during the pendency of the criminal charges would pose a threat to the health or safety of the public."

[9] While the New York law does not define "serious crimes," the term usually refers to violent crimes or grand larceny. The FBI's Uniform Crime Reporting (UCR) statistics refers to "serious crimes" when it means **"**murder and nonnegligent manslaughter, forcible rape, robbery, aggravated assault, burglary, larceny-theft, motor vehicle theft, and arson." *See* http://www.fbi.gov/ucr/ucrquest.htm.

The TLC tribunal has three locations—Long Island City, Rector Street (Manhattan) and JFK Airport. Suspension and other so-called "fitness" hearings are conducted at Rector Street, and presiding there is considered a promotion. Gottlieb 89. Most ALJs remain at Long Island City, adjudicating ordinary citations. Bonina 112-13. Hours and assignments are determined by supervisors, including Ms. Bonina, Mr. Coyne, and TLC Deputy Commissioner Eckstein. Bonina 37, 113-14. ALJs report to the supervisory ALJs, who report in turn to Deputy Commissioner Eckstein. Bonina 15-16. All ALJs may be fired for any reason or no reason. Bonina 71; Fioramonti 18-19. They have no right to work any particular number of days. All may have their responsibilities modified or their hours (and pay) reduced without recourse. Bonina 112-13.

At the post-suspension hearings, TLC ALJs rule not based on the administrative code or TLC rules, but based on "training" they receive from their colleagues. Coyne E-mail, Exh. 12. Frank Fioramonti, the TLC judge who presides over more post-suspension hearings than any other, summarized the process: "It's generally sort of a master/ apprentice approach. You're going to be doing fitness hearings, you watch somebody doing them and you do them." Fioramonti 50. Of course, any new judge seeing his "master" would surely see that the suspensions are never lifted.[10]

The TLC employs scores of ALJs at any given time (recently the number was 83). Bonina 23-24. But a much smaller sub-set (15) presides at post-suspension hearings. Indeed, just two ALJs, Mr. Fioramonti and Carmena Schwecke preside in 50% of the

[10] Mr. Fioramonti testified in his deposition: "[W]e are sort of on the low end of the totem pole, the administrative law judges are at the Taxi Commission." Fioramonti 17. Asked by his own counsel, to elaborate, the TLC judge added: "[W]e are at-will employees, we don't have a contract, we are not considered to be in the Taxi Commission legal structure. We have our own little side operation, which is the administrative law judge work." Mr. Fioramonti continued: "And because we are not part of the Taxi Commission legal department, nobody says to us what do you think about this, that or the other." Fioramonti 61-62.

cases. Five ALJs preside 81% of the time. Ackman Decl. ¶ 6. Ms. Bonina testified that not every ALJ was trained in suspension hearing practice. Bonina 24, 37-38. But the "training" for this select few consists of sitting in on a few hearings. Gottlieb 23.

Some ALJs, such as Mr. Coyne and Ms. Bonina, are promoted to supervisory roles. Others, such as former general counsel Peter Mazer and current deputy commissioner Joseph Eckstein, are promoted to full-time salaried positions with the TLC. While all ALJs are paid at the same hourly rate, some work much more than others. Some receive so-called "special projects" doing non-adjudicative work, and can increase their incomes that way. Coyne 174-175; Gottlieb 84-85; Mazer 6, 75. As a result, some ALJs earn much more than others. In 2006, for example, Mr. Fioramonti was paid $22,184; Michael Schwartz, another longtime TLC ALJ, was paid $23,290. Mr. Coyne was paid $84,700, *see* Exh. 23.

A city-wide regulation provides that no TLC ALJ is supposed to work more than 1000 hours per year. Bonina 47-48; Fraser 70. In fact, many are allowed to work far more, including Mr. Coyne, Ms. Schwecke, and Ms. Bonina. Coyne 9-10; Bonina 11-12; *see also* Exh. 23. Mr. Gottlieb (and others) was told following his reprimand that the 1000-hour cap would be enforced, though it had never been before. Gottlieb 97. Mr. Coyne, meanwhile, claims he was told that the cap would not apply to him because he is a supervisor, even if the language of the rule makes no such exception. Coyne 122; *see* Exh. 24 (the regulation).

In suspension cases, the ALJs rule based on a "standard" that is stated by an internal TLC ALJ Manual (Exh Q). Coyne 34-35; Bonina 97, 128-29. By this standard, the driver's guilt is assumed. Coyne 53-54. This manual is not made available to taxi

drivers or their lawyers. It is not published, or posted on the TLC website. Daus 120-21; Fraser 47; Coyne 37-38. Both the manual and the training are all *ex-parte* communications between the TLC executives and its ALJs. As a result, the ALJs never disturb the determinations of the TLC lawyers—with the exception of Mr. Gottlieb.

As noted, Mr. Gottlieb was reprimanded when he ruled in favor of a cabbie. He testified he was worried he could be sent back to Long Island City. Gottlieb 89. As a result, he promised to change and he would never rule in favor of a cabbie on summary suspension again. Of course, Mr. Gottlieb is the only ALJ in recent years to buck the TLC's unwritten policy. Mr. Fioramonti, for instance, never did. But even the reliable Mr. Fioramonti was warned at times. In his March 22, 2006 e-mail to Mr. Hardekopf, Mr. Coyne assures the prosecutor: "[Mr. Fioramonti] has been spoken to in the past … and I will speak to him again." Exh. 16.

ARGUMENT

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure a moving party is entitled to summary judgment "when after viewing all the facts in the record in a light most favorable to the non-moving party, there is no genuine issue of material fact present, 'so that the moving party is entitled to judgment as a matter of law.'" *Forsyth v. Fed'n Employment and Guidance Serv.*, 409 F.3d 565, 569 (2d Cir. 2005) (quoting Rule 56(c)); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Once the moving party has made a properly supported showing sufficient to suggest the absence of any genuine factual issue, to defeat the motion the opposing party must come forward with evidence that would be sufficient to support a jury verdict in its favor. *Goenaga v. March of Dimes Birth Defects Found.*, 51 F.3d 14, 18 (2d Cir. 1995). Here, plaintiffs have

demonstrated facts that are admitted or undisputed and are more than sufficient to support this motion.

I. The TLC's Enforcement of an Unenacted, Unwritten Rule Violates the City Charter

Plaintiffs have a property right to their licenses, long established by state law. *Bell v. Burson*, 402 U.S. 535, 539 (1971); *Padberg v. McGrath-McKechnie*, 203 F. Supp. 2d at 276; *Hecht v. Monaghan*, 307 N.Y. 461 (1954). This right cannot be denied without due process of law. Here, defendants have suspended plaintiffs' hack licenses without legitimate hearings, and deprived them of their livelihood, lacking even a legal basis for their policy.

Defendants' practices violate the City Charter, the City Administrative Procedure Act (CAPA), city statutes, and even the TLC's own rules. In a nutshell, an administrative agency may not impose penalties and deprive citizens of property based on policies or practices never publicly announced nor properly enacted. Here the TLC has done just that, imposing a rule of "potentially devastating impact," without the "clear mandate" required. *See SEC v. Sloan*, 436 U.S.at 112.[11]

The City Charter mandates that the TLC make policy by a majority vote of its commissioners. Charter § 2301(e). Such a vote was held, as it must be, to enact the December 2006 rule changes. But none was taken to enact the unwritten rule long in effect and still in effect when this action was commenced. New York courts are quite exacting in defining what constitutes a legally effective vote. *E.g., Town of Smithtown v.*

[11] In other recent cases relating to the constitutionality of pre-judgment seizures, the courts have emphasized that the government was at least proceeding pursuant to a statute directly tailored to the purpose. *See Krimstock v. Kelly*, 306 F.3d 40, 43-46 (2d Cir. 2002), *cert. denied*, 539 U.S. 969 (2003); *County of Nassau v. Canavan*, 1 N.Y.3d 134, 137-38, 770 N.Y.S.2d 277, 281-82 (2003). Even so, there were constitutional violations.

Howell, 31 N.Y. 2d 365, 339 N.Y.S.2d 949 (1972) (failure to obtain 10 votes of 15 members fatal to attempted zoning change); *D.E.P. Resources, Inc. v. Planning Bd. of the Village of Monroe*, 131 A.D.2d 757, 516 N.Y.S.2d 954 (2d Dep't 1987) (three votes out of five-member board needed for board to act). In this case, there was no vote and no majority, making the unwritten rule void and unenforceable.

The TLC's violation of CAPA, also part of the City Charter, yields the same result. CAPA § 1043(b) requires that city agencies, the TLC included, publish proposed rules and allow the public to comment before enactment. There is no other way, as the statute plainly provides: "No agency shall adopt a rule except pursuant to this section." § 1043. The notice-and-comment requirement is a central principle of administrative law, articulated not just by the city, but at the federal level in the federal Administrative Procedure Act (*see* 5 USC § 553 [c]) and the state level in the New York State Administrative Procedure Act (*see* SAPA § 202 [5] [b], [c]). The TLC never attempted to comply (until the December 2006 rule changes). This defect, too, voids the rule.

New York Courts have strictly enforced the notice-and-comment requirement, including quite often against the TLC. 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 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 [CAPA], the revocation of petitioner's taxi driver's license pursuant to that rule was arbitrary and capricious." 306 A.D.2d at 203.

In *Matter of Singh v Taxi and Limousine Comm.*, 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 also violated the act. *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). Finally, in *Padberg v. McGrath-McKechnie*, 2006 U.S. Dist. LEXIS 95174 (E.D.N.Y. 2006), the district court held that nearly identical CAPA claims were properly pleaded.

The courts in the TLC cases applied a well-settled principle of New York law. For example, in *Matter of Cordero v. Corbisiero*, 80 N.Y.2d 771, 587 N.Y.S.2d 266 (1992), a jockey had been suspended for violating a racing authority rule while competing at the Saratoga racetrack. The racing board determined that he must serve the suspension at the same track and not at Belmont or Aqueduct. The New York Court of Appeals voided the ruling because the newly-announced rule could not be enforced absent notice and comment. Of course, the CAPA violation in this case is far more blatant than those found in *Matter of Cordero* and in the TLC cases: The rule invention is more brazen and the resulting penalties more severe.

This fundamental lack of notice of suggests a constitutional wrong as well. Cabbies are entitled to fair notice "not only of the conduct that will subject him to punishment" but the "the magnitude of the sanction" that the state may impose. *BMW of N. America v. Gore*, 517 U.S. 559, 574 (U.S. 1996); *see also State Farm Mut. Auto. Ins.*

Co. v. Campbell, 538 U.S. 408, 417 (U.S. 2003). Certainly when the state action infringes on the presumption of innocence, notice must be especially clear.

Instead, there was no notice at all. There was no statute and no rule (until December 2006) that would alert a taxi driver that a mere allegation could result in the suspension of his license. While defendants from time to time cite NYC Admin. Code § 19.512.1 and TLC Rule 8-16, neither provision mentions or implies that an arrest would or could result in suspension. While *BMW* and *State Farm* involve punitive damages, the violation of the fair notice principle is even more dramatic here. At least in *BMW* and *State Farm*, the defendants had been found liable for some wrong. Here, plaintiffs are punished based on an allegation. While a taxi driver may be able steer clear of crime, he can hardly guard against false accusation. In short, the TLC's unwritten policy leads to "judgments without notice" and a violation of Due Process. *See Shaffer v. Heitner*, 433 U.S. 186, 217 (1977) (Stevens, J., concurring in judgment).

II. The Unwritten Rule Violates City Statutes and the TLC Rules

A. The Administrative Code Permits Summary Suspensions, But Only on Finding of Good Cause by the Commission

The administrative code does permit summary suspension of licenses in certain limited circumstances. As a pre-condition, the commission must find "good cause." Second, the cab driver must be afforded the right to a prompt hearing "before the commission or other administrative tribunal of competent jurisdiction." Upon a summary suspension, the commission must institute revocation proceedings, hold a hearing, and render a decision or return the license within 60 days. Admin. Code § 19-512.1. In practice, the TLC executive ignores each of the law's requirements. The commission makes no finding. It denies the cabbie the option of a hearing before the commission. It

does not commence revocation proceedings. Rather than limit the suspension to 60 days, it permits suspensions of indefinite duration.

Under New York law, courts must first "turn first to the plain language of the statutes as the best evidence of legislative intent." *Malta Town Centre I, Ltd. v Town of Malta Bd. of Assessment Review*, 3 N.Y.3d 563, 568, 789 N.Y.S.2d 80 (2004). As the language of the statute itself is the clearest indicator of legislative intent, the statutory text must be the starting point in any effort at interpretation and courts must give effect to its plain meaning**.** *Majewski v Broadalbin-Perth Cent. School Dist.*, 91 N.Y.2d 577, 583, 673 N.Y.S.2d 966 (1998). There is nothing in section 19.512.1 or anywhere else in the administrative code that suggests the "good cause" requirement may be abandoned, or that it may be exercised by a TLC attorney, or that an arrest alone is sufficient to constitute "good cause." While the TLC chapter defines in specific terms instances where a cabbie's license may be suspended, there is no suggestion that suspensions based on arrests are required or permitted. The legislative history is equally silent.

Where § 19-512.1 applies at all, suspensions must be instigated by "the commission." In the same way, under § 19-504, it is the duty of "the commission" to promulgate rules—and certainly TLC staffers may not do that. In short, when the legislature imposes powers or responsibilities on "the commission," its meaning is plain and there is no lawful substitute for commission action. Thus, only the commission has the power to summarily suspend (and then only for good cause shown). TLC practice to the contrary is illegal.

B. TLC Rules Must Conform to the Code, and the Agency Must Follow Its Own Rules

It is a bedrock tenet of administrative law at both the federal and state level that an agency rule or regulation cannot supersede legislation. *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 131 (1944); *Pittston Steverdoring Corp v. Dellaventura*, 544 F.2d 35, 38 (2d Cir. 1976); *Matter of Trump-Equitable Fifth Ave. Co. v. Gliedman*, 57 N.Y.2d 588, 595, 457 N.Y.S.2d 466, 443 N.E.2d 940 (1982). This principal is reiterated in the administrative code itself. The code provides: "No rule or regulation promulgated subsequent to the effective date of this local law may be inconsistent with or supersede any provision of this local law and any rule or regulation in effect on the effective date of this local law that is inconsistent with any provision of this local law shall be of no further force and effect." § 19-503(b). TLC Rule 8-16, on which defendants purport to rely, is inconsistent with the code in that it purports to allow the chairman, and not the commission, to order summary suspensions. The rule then compounds the wrong by denying drivers the option of an appeal to the commission.

Even if Rule 8-16 were lawful "it is fundamental" that the TLC must follow it. *Bryant v. Coughlin*, 77 N.Y.2d 642, 647, 569 N.Y.S.2d 582 (1991); *See also Garcia v. Le Fevre*, 64 N.Y.2d 1001, 1003, 489 N.Y.S.2d 48 (1985). Still, the TLC executive honors the rule no more than it honors the code. Mr. Fraser and the chairman have both admitted that the chairman makes no such finding that "emergency action" is required.

Defendants have suggested, without evidence, that the chairman has somehow "delegated" his duty. There is, however, nothing in the code or the rules suggesting delegation is permitted here, and nothing in the record suggesting it was accomplished. Rule 8-16 empowers the chairman, not the general counsel, and not a TLC lawyer.

Where delegation *is* contemplated, such as in TLC Rule 8-17, the rule permits action by the Chairman "or his designee." The emergency suspension rule (8-16) contains no such language and the power to delegate does not exist. Where the commission (or chairman) is charged with a duty to act, due process requires action by the commission itself, not by some other body or individual. *See Anderson v. Recore*, 446 F.3d 324, 333 (2d Cir. 2006). As the Supreme Court stated in *United States ex rel Accardi v. Shaughnessy*, "If the word 'discretion' means anything in a statutory or administrative grant of power, it means that the recipient must exercise his authority according to his own understanding and conscience." 347 U.S. 260, 267 (1954). Besides, the TLC lawyers who do order the suspensions do not make the required good cause finding either.

III. A Taxi Driver Has a Constitutional Right to a Hearing before his License in Suspended

At the preliminary injunction stage, the Court found that a taxi driver was not entitled to a pre-suspension hearing.[12] This preliminary finding was based on the TLC's claim that a driver would receive a genuine post-suspension hearing and that the likelihood of erroneous deprivation was small. Undisputed facts now in the record undermine both arguments. Based on the current record and the test established by *Mathews v. Eldridge*, 424 U.S. 319 (1976), a pre-suspension hearing is required as a matter of due process.

As this Court stated, there are three factors in the *Mathews* test: "(1) the private interest affected; (2) the risk of erroneous deprivation through the procedures used and the value of other safeguards; and (3) the government's interest." *Id*. As to the first

[12] As this Court stated in conference on April 20, preliminary injunction rulings are not the law of the case. *See also Goodheart Clothing Co. v. Laura Goodman Enterprises, Inc.*, 962 F.2d 268, 274 (2d Cir. 1992) (preliminary injunction rulings "ordinarily tentative, pending a trial or motion for summary judgment").

factor, there is no dispute. As the court stated in *Padberg*, suspending a hack license "does far more than inconvenience drivers; it deprives them of their very livelihood." 203 F. Supp.2d at 277.

As to the second factor, defendants argued the risk of erroneous deprivation was low because the driver was arrested by a trained police officer, citing *Gilbert v. Homar*, 520 U.S. 924, 934 (1997). The established facts gut this contention. First, 90% of the taxi drivers arrested are later exonerated, their charges being dismissed, reduced to a violation, or not prosecuted. TLC officials knew all along, as Mr. Hardekopf testified, that the odds of conviction are "very low." Moreover, *Gilbert* involved a police officer arrested in a police raid and charged with a felony. Most arrested taxi drivers are charged with misdemeanors and are accused by civilian complainants. Neither the Supreme Court, nor the Second Circuit has followed *Gilbert* where the case involved someone other than a law enforcement officer arrested on felony charges. Indeed, no district court within the Second Circuit has followed *Gilbert* outside the law enforcement context either. In *Padberg*, Judge Dearie cited *Gilbert*, but held that taxi drivers were entitled to pre-suspension hearings as a matter of due process. Judge Dearie reached this conclusion despite the fact that the taxi drivers in that case were accused by TLC inspector witnesses who personally witnessed the alleged wrongdoing in a sting operation. 203 F. Supp.2d at 272 & 278.

The Second Circuit, in *Krimstock v. Kelly*, 306 F.3d 40 (2d Cir. 2002), *cert. denied*, 539 U.S. 969 (2003), drew a sharp distinction between felony and misdemeanor charges: "Unlike a felony charge, for which a 'prompt' probable cause hearing must be held or evidence of probable cause must be presented to a grand jury, … a misdemeanor charge of DWI requires no post-arrest determination of probable cause." *Id.* The

Krimstock court found the defendants' procedures unconstitutional despite the fact that trained police officers personally witnessed the alleged DWI offense. The court still found that "Some risk of erroneous seizure exists in all cases, and in the absence of prompt review by a neutral fact-finder, we are left with grave Fourth Amendment concerns…." *Id. at* 50-51.[13] Weighing the *Mathews* factors, it held a prompt pre-seizure hearing was required. Id. at 71. The New York Court of Appeals reached the same conclusion in *County of Nassau v. Canavan*, 1 N.Y.3d 134, 142, 770 N.Y.S.2d 277, 285 (2003). In ordinary taxi driver arrests there is rarely a police witness. Thus the second prong of the *Mathews* test favors the plaintiffs.

As for the government's interest, there is no reason the TLC could not hold some form of hearing (and a legitimate hearing) before the suspension. As Judge Dearie—who was extremely sympathetic to the TLC's goals, calling them "laudable"— stated in *Padberg*, "Typically, the Supreme Court has allowed deprivation prior to a hearing in cases involving pressing and immediate threats to the public health and safety." 203 F. Supp.2d at 280. Here, the TLC claims the need to protect taxi passengers. But it applies its unwritten rule without regard to whether the alleged victim was a passenger—and without regard to the facts of the alleged crime or the driver's record. Absent some real evidence of imminent danger, there is no compelling interest in immediate suspension. A prompt pre-suspension hearing would minimize the risk of erroneous deprivation. *County of Nassau v. Canavan*, 1 N.Y.3d at 143. The TLC could hold a prompt hearing to learn the nature of the charges and the defenses. All told, given the undisputed facts now

[13] To be sure, *Krimstock* involved a technically post-suspension hearing. But in the context of a DWI charge, there was no contention that a pre-suspension hearing was possible or required. The issue was whether the motorists were entitled to a hearing before the civil action—the seizure of their cars. As here, the seizure was a civil procedure in response to a criminal allegation—the *Krimstock* court called it "a post-seizure, pre-judgment hearing" — a situation directly parallel to this case. 306 F.3d at 67.

in the record, the *Mathews* balance strongly favors the taxi driver's right to a meaningful hearing before his license is suspended.

IV. The Post-Suspension Hearings Violate Elemental Due Process Requirements

Due Process requires a meaningful hearing at a meaningful time. *Fuentes v. Shevin*, 407 U.S. 67, 80 (U.S. 1972); *Krimstock v. Kelly*, 306 F.3d 40, 51 (2d Cir. 2002). At the preliminary injunction stage, defendants argued the post-suspension hearings were sufficient to satisfy due process. After all, there was a judge, the right to counsel, and the opportunity to testify. *See* Decl. of Mary O'Sullivan dated July 5, 2006 ¶¶ 10-14. They pointed to allegations in a criminal complaint that the TLC never saw before the suspension—but that it learned after the fact from Mr. Nnebe. *See* Decl. of Marc Hardekopf dated August 18, 2006 ¶ 24. In fact, TLC judges have now admitted they do not consider or inquire about the alleged facts of the crime in making their recommendations. Most important, the TLC judges admit they always continue the suspensions no matter what, acting on *ex parte* "training" and an *ex parte* "standard" disseminated by an internal manual. Though defendants knew the facts, they omitted them during the preliminary injunction arguments, deceiving this Court.

Based on defendants' sworn statements, this Court (at the preliminary stage) found the post-deprivation hearing to be fair and meaningful and found that a pre-deprivation hearing was not required. Order dated Aug. 7, 2006 at 9. The undisputed facts now in evidence should reverse this finding: the hearings are unfair and meaningless, their outcomes assured. Such counterfeit hearings should have no weight in assessing the right to pre-suspension hearings. More important, the post-suspension hearings compound the due process violation, and violate CAPA mandates as well.

The disparity between TLC practice and what the case law requires is stark. The *Krimstock* case, involving pre-judgment seizure of vehicles, is particularly telling. In *Krimstock*, after remand from the Second Circuit, Judge Mukasey ordered that prompt hearings on the validity of the seizure be held by the Office of Administrative Trials and Hearings (OATH), a city agency, which employs full-time judges who serve five-year terms. Judge Mukasey ordered: "Such a hearing will provide the claimant with an opportunity to be heard, either in person or through counsel, as to three issues: whether probable cause existed for the arrest of the vehicle operator; whether it is likely that the City will prevail in an action to forfeit the vehicle, and whether it is necessary that the vehicle remain impounded in order to ensure its availability for a judgment of forfeiture. The burden of proof by a preponderance of the evidence as to these issues will be upon the Police Department…." *Krimstock v. Kelly*, 2005 U.S. Dist. LEXIS 43845, 3-4 (S.D.N.Y. 2005). This order simply imposes due process and CAPA requirements. Yet no remotely comparable hearing is afforded a taxi driver. This lack of due process is especially egregious considering the vital importance of a hack license and the absence of the type of emergency inherent in drunk driving.

As it happens, TLC General Counsel Fraser was previously an OATH judge in charge of *Krimstock* hearings. Fraser 163-64. He admitted that at TLC hearings, the TLC does *not* prove probable cause for the arrest. It is *not* required to prove that it will likely prevail on the merits. It is *not* required to prove that suspension is necessary to ensure that the taxi license may later be revoked. *Id*. at 167-68. The only evidence the TLC offers at such hearings is the arrest notification. Hardekopf 51. Rather than offer

the taxi drivers a meaningful hearing at a meaningful time, it performs a farce. Thus, the entire TLC suspension procedure is unconstitutional.

The TLC procedure also fails under CAPA. The statute requires that the agency initiating the adjudication bear the burden of proof. CAPA §1046(c)(2). But defendants admit they do not: TLC presents an arrest notice and rests its case. Hardekopf 37-38; Coyne 161. The statute prohibits an agency from engaging in *ex parte* communications with ALJs, including the communication of "internal agency directives not published as rules." CAPA §1046(c)(1). The TLC admits to pervasive violations of this rule.

These *ex parte* contacts influence every adjudication. Beyond CAPA, *ex parte* instructions impinge on due process rights as well. Even in a quasi-adjudicative context, the Second Circuit has held that "the insulation of the decisionmaker from *ex parte* contacts is justified by basic notions of due process to the parties involved." *Orangetown v. Ruckelshaus*, 740 F.2d 185, 188 (2d Cir. 1984); *see also Stone v. FDIC*, 179 F.3d 1368, 1377 (Fed. Cir. 1999) (*ex parte* contacts also a due process violation); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 56 (D.C. Cir. 1977) (*ex parte* contacts inconsistent with "fundamental notions of fairness implicit in due process and with the ideal of reasoned decisionmaking.") Here, the *ex parte* contacts relate not just to one hearing or two: They are standing orders telling judges how to rule and guarantying the results.

V. The TLC Courts Are Systemically Biased in Favor of the Agency

In *Padberg*, Judge Dearie held there was sufficient evidence to present a claim that the TLC ALJs were so biased as to render their decisions unconstitutional. 203 F. Supp. 2d 261, 288-89. He pointed, in particular, to an *ex parte* memo from the chief ALJ to the other ALJs. Additional evidence found here is even more compelling.

The Supreme Court has held that due process requires a "fair trial in a fair tribunal." *Withrow v. Larkin*, 421 U.S. 35, 46 (1975) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). "[A]dministrative agencies which adjudicate" are bound by this rule as well. *Id.* A biased decision-maker renders the proceeding unconstitutional. *Id*. at 47. There is, to be sure, a presumption of honesty and integrity (*Withrow*, 421 U.S. at 46) but here that presumption has been shattered.

When the adjudicator has a pecuniary interest in the outcome of the case, the Supreme Court has recognized that the risk of bias is strong enough that the proceedings will not satisfy due process. It is an idea as old as the Republic. Indeed among the grievances against King George listed by the founders in the Declaration of Independence is: "HE has made Judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries." So it is for the TLC.

The Supreme Court's bias cases do not require proof of an outright bribe or payment in exchange for a particular decision. The financial interest can be indirect. Thus in *Tumey v. Ohio*, 272 U.S.510 (1927), the Court held unconstitutional a scheme where prosecuting attorneys and police officials were paid a percentage of the fines imposed in the cases they prosecuted, and where the town mayor, who served as judge, was paid out of court costs imposed on defendants found guilty. In *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), the Court held that it violated Due Process for a town mayor to act as judge "in cases of ordinance violations and certain traffic offenses" where the town derived a substantial portion of its revenues from the traffic court. In *Gibson v. Berryhill*, 411 U.S. 564 (1973), the Court held that a state optometry board "composed solely of optometrists in private practice for their own account" could not sit as judges in

cases where licensed optometrists were charged with violating state law by working as employees for a corporation.

More recently, in *Haas v. County of San Bernardino*, the California Supreme Court considered a situation where a local government hired a per-diem hearing officer, a close parallel to the case at bar. 27 Cal. 4th 1017, 45 P.3d 280 (California Supreme Court 2002). In *Haas*, a massage clinic received a notice of revocation when one of its employees was accused of proposing a sexual act to an undercover police officer. The matter was set for a hearing and the county proposed hiring a local attorney as the hearing officer. The massage parlor owner objected on the ground that the county hiring its own hearing officer would create an actual conflict of interest and/or potential conflict of interest in violation of the Due Process Clauses of the Federal and California constitutions. The California Supreme Court agreed and held that the arrangement violated due process. The court held: "[a] judge has a disqualifying financial interest when plaintiffs and prosecutors are free to choose their judge and the judge's income from judging depends on the number of cases handled. No persuasive reason exists to treat administrative hearing officers differently." 45 P. 3d at 285-86 (footnotes omitted). In words mirroring the Declaration of Independence and applying perfectly to the TLC, the court concluded:

> Here . . . the prosecuting authority may select its adjudicator at will, the only formal restriction here being that the person selected must have been licensed to practice law. . . . [W]hile the adjudicator's pay is not formally dependent on the outcome of the litigation, his or her future income as an adjudicator is entirely dependent on the goodwill of a prosecuting agency that is free to select its adjudicators and that must, therefore, be presumed to favor its own rational self-interest by preferring those who tend to issue favorable rulings. 45 P. 3d at 289 (citations and footnotes omitted).

TLC judges may be fired by the agency at any time. A TLC judge can be promoted or demoted. He or she can be denied or granted assignment without recourse. Thus he is, consciously or not, likely to rule in ways that will please the agency that controls his purse. When the supervisors in that agency provide "training" on unwritten rules, when they subject the judges to *ex parte* "standards," when independent-minded ALJs are subject to reprimand, the "situation is one which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true." *Ward v. Village of Monroeville*, 409 U.S. at 60 (internal quotations omitted). The uniform results of summary suspension cases show that this temptation, this bias, is not just a possibility. It is real and omnipresent.

CONCLUSION

The due process and statutory violations alleged in this action stand proven. Defendants' unwritten automatic suspension policy fails on every level—constitutional, statutory, regulatory, and adjudicatory. They employ, in the words of Justice Rehnquist, "an awesome power" with frivolous abandon. For all of these reasons, plaintiffs should be granted summary judgment on all counts.

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