

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY


CP

In the Matter of the Application of ROBERTA REARDON,
Commissioner of the New York State Department of Labor,

Petitioner,

DECISION and ORDER

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

Index No.: 2643-17
RJI No.: 01-17-ST8693

-against-

GLOBAL CASH CARD, INC. and NEW YORK STATE
INDUSTRIAL BOARD OF APPEALS,

Respondent(s).

(Supreme Court, Albany County, Article 78 Term)

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APPEARANCES:

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HON. W. BROOKS DeBOW, Acting Justice:

A previously filed Decision, Order and Judgment in favor of petitioner that annulled a Resolution of Decision of respondent New York State Industrial Board of Appeals ("IBA") (see Matter of Reardon v Global Cash Card, et al., Albany County Index #2643-17 [DeBow, A.J.S.C.,

May 23, 2018]), now comes before the Court upon the successful motion of respondent Global Cash Card to reargue the merits of this matter (Matter of Reardon v Global Cash Card, et al., Albany County Index #2643-17 [DeBow, A.J.S.C., Oct. 15, 2018]).

Respondent Global Cash Card had administratively petitioned respondent IBA to review the validity and reasonableness of certain regulations in 12 NYCRR part 192 that petitioner Reardon had adopted to regulate payment of wages by payroll debit card, particularly those that address the locations of automated teller machines (ATMs) and prohibit charging employees certain fees associated with their use of ATMs to access their wages (see 12 NYCRR § 192-2.3 [b] [1]; [2]). Respondent IBA issued a Resolution of Decision finding that the Commissioner had exceeded the authority delegated to her by the Legislature because the restrictions on payroll debit cards extended beyond her competence and expertise in the area of employment relationships and encroached upon the jurisdiction of the Department of Financial Services (DFS), the State's banking and financial services regulator. The IBA declared invalid and revoked the entirety of 12 NYCRR part 192. This Court annulled the IBA's February 16, 2017 Resolution of Decision on the ground that it was arbitrary and capricious for respondent IBA to vacate the entirety of Part 192 because that entire part, entitled "Methods of Payment of Wages," regulates methods and practices of all forms of payment to employees' including cash, check and direct deposit as well as payroll debit cards, and respondent Global Cash Card had sought administrative review of specific provisions within Part 192 that address only payroll debit cards. As stated by this Court in its prior decision:

"The petition and the administrative proceeding – brought by a party whose only interests in Part 192 that were provisions applicable to payroll debit cards – were focused exclusively on those parts of Part

192 that governed conduct related to the use of payroll debit cards. Nothing in the administrative proceeding challenged regulatory provisions within Part 192 that are addressed to payment by cash, check or direct deposit.”

(Matter of Reardon v Global Cash Card, et al., Albany County Index #2643-17, supra). The Court’s decision was reached upon voluminous submissions including the full administrative record, affidavits and attorney affirmations, and memoranda of law. Absent from the Court’s consideration was a memorandum of law from respondent Global Cash Card, and for that reason, Global Cash Card’s motion to reargue was granted.¹

Petitioner asserts that the matter was correctly decided in the prior Decision and Order, while respondent Global Cash Card asserts that the IBA’s Resolution of Decision was not arbitrary and capricious or irrational, that review of the Boreali factors (see Matter of Boreali v Axelrod, 71 NY2d 1 [1987]) supports the IBA’s conclusion that the Commissioner exceeded the scope of her delegated authority, and that the breadth of the IBA’s express decision invalidating the entirety of Part 192 is not excessive because the record demonstrates the specific provisions that were being considered by the IBA. Respondent IBA did not offer a written submission on the motion to reargue, and counsel for the IBA appeared at oral argument but declined to offer argument. For the reasons that follow, the Court adheres to its prior Decision, Order and Judgment.

Respondent Global Cash Card correctly argues that judicial review of the IBA’s Resolution

¹ The Decision, Order and Judgment upheld that part of the IBA’s decision that found that Global Cash Card had standing to challenge the regulations in the administrative proceeding before the IBA and denied respondent Global Cash Card’s motion to correct the record and strike therefrom certain documents that were not before the IBA. Those aspects of this Court’s judgment are not at issue on reargument, and that part of Global Cash Card’s motion that sought renewal pursuant to CPLR 2221 (e) for the purpose of submitting information from respondent IBA’s website was denied.

of Decision, in this proceeding pursuant to CPLR article 78, is of whether the IBA's determination was arbitrary and capricious or irrational. It bears noting that this Court's review of the matter is addressed to the determination rendered by the IBA after reviewing petitioner's conduct, and does not include direct or de novo review of petitioner's conduct itself.

As indicated above, the IBA's determination was annulled by this Court on the narrow ground that it was arbitrary and capricious for the IBA to have invalidated the entirety of Part 192 when the issues raised in the administrative proceeding involved only those provisions of Part 192 that addressed payroll debit cards. Respondent Global Cash Card asserts that "[a] close reading of the IBA's determination makes clear that the agency passed only upon the portions of the regulations that were challenged by Global Cash Card" (Global Cash Card Brief, dated July 12, 2018, at 6). However, the decretal provision of the IBA's Order states in its entirety: "The regulations regarding methods of payment of wages adopted September 7, 2016 to be codified as 12 NYCRR part 192 are revoked" (Kerwin Affirmation, Apr. 24, 2017, Exhibit E, at p.12 [emphasis added]). The underscored phrase is not modified by a reference to payroll debit cards, and the record that was before the IBA does not demonstrate that the regulatory provisions that were adopted on September 7, 2016 related only to payroll debit cards and not other methods of payment of wages. Notably, the IBA's recitation of "the specific rules challenged" (id., at p.2) includes provisions that were not among those expressly challenged in Global Cash Card's administrative petition (see id., Exhibit B, ¶¶ 54-55). If the Court were inclined to modify the overbroad decision of the IBA, the discrepancy between the provisions recited at page 2 of the IBA's determination and those that are recited in Global Cash Card's administrative petition defeat any effort to discern which specific provisions of

Part 192 should be invalidated. The difficulty in effecting such a judicial modification is demonstrated in the colloquy between the Court and Global Cash Card's counsel during oral argument, during which counsel implicitly acknowledged that the IBA's decision was subject to interpretation as to the provisions that it sought to invalidate (see Transcript of Proceedings, Nov. 14, 2018, at pp. 12-14). The IBA's Resolution of Decision is the definitive statement of its determination and remedy, and it says what it says, especially in light of the IBA's statutory authority to have modified petitioner's adopted regulations by specifically invalidating only those provisions that it found to be outside the scope of petitioner's authority. Respondent Global Cash Card's argument that a close reading of the IBA's decision reveals that the IBA intended to revoke only those provisions related to payroll debit cards is not unreasonable, but the Court's ability to modify the IBA's overbroad remedy is undermined by uncertainty as to which provisions in Part 192 should have been invalidated or modified, and which should be left intact.² Thus, the Court adheres to its prior conclusion that it was arbitrary and capricious for the IBA to have invalidated the entirety of Part 192.

To the extent that respondent Global Cash Card suggests that an appropriate judicial remedy would be remittal to the IBA for further proceedings, it does not appear that such a remedy is available in the circumstances presented by this matter. Remittal for further proceedings by the

² Respondent Global Cash Card's motion to renew, seeking to expand the record in this judicial proceeding to include a summary of decision that was posted on the IBA's website, was denied by this Court (see Matter of Reardon v Global Cash Card, et al., Albany County Index #2643-17 [DeBow, A.J.S.C., Oct. 15, 2018]). To the extent that the website summary stated the specific provisions of Part 192 that the IBA intended to invalidate, the Court noted that nothing was offered to support the necessary conclusion that a summary of decision on an agency's website has the legal effect of correcting or modifying the plain language of a decision of the IBA, and indeed, the viability of such an argument is doubtful.

administrative body is appropriate where university tenure decisions were found to be arbitrary and capricious or otherwise improper, so that the tenure application can be properly decided by the agency within whose domain a tenure decision should be made (see Matter of New York Inst. of Tech. v State Div. of Human Rights, 40 NY2d 316 [1976]; Matter of Skorin-Kapov v State Univ. of N.Y. at Stony Brook, 281 AD2d 632, 633 [2d Dept 2001], lv denied 96 NY2d 720 [2001]; Matter of Aievoli v State Univ. of N.Y., 264 AD2d 476, 477 [2d Dept 1999]). While remittal to the IBA may be appropriate for further proceedings in the nature of recalculation of amounts in wage orders that lacked evidentiary support (see Matter of Angello v National Finance Corp., 1 AD3d 850, 854 [3d Dept 2003]), respondent Global Cash Card points to no precedent for remittal to correct a decision that is found to have been arbitrary and capricious or even the product of error by the administrative body.

Furthermore, and even if the matter could be remitted for the purpose of permitting respondent IBA to narrow the scope of its overbroad order, respondent IBA's Resolution of Decision "was based upon its finding that petitioner had overreached her authority by intruding into the regulation of banking" (Matter of Reardon v Global Cash Card, et al., Albany County Index #2643-17, May 23, 2018, supra, at p.7). This rationale appears to have been based upon certain passages from public comments that were submitted during the rule-making process, in which petitioner was encouraged to consult with the DFS to ensure that she was not exceeding her statutory authority by adopting regulations that were addressed to banking (id., at pp. 6-7, 8), and perhaps upon a statement made in respondent Global Cash Card's administrative memorandum of law that the Commissioner lacked expertise in financial accounts, and that certain federal and state regulators, including DFS,

had expertise in the areas of banking and payment cards (see Kerwin Affirmation, Exhibit B [Global Cash Card's Memorandum of Law in Support of Administrative Petition, at 14]). Other than this, the issue of whether Part 192 intruded into the domain of DFS was not presented to respondent IBA.

Specifically, respondent Global Cash Card's administrative petition asserted three fully articulated "Grounds for Review," namely (1) that adoption of Part 192 had been "an improper attempt [by petitioner] to circumvent the legislative process" (Kerwin Affirmation, Exhibit B [Global Cash Card's Administrative Petition], at ¶ 142 [emphasis added]; see ¶¶ 143-148; [Global Cash Card's Memorandum of Law], Point I; (2) that the subject matter of payroll debit cards is "expressly pre-empted by federal law" (id., Exhibit B [Global Cash Card's Administrative Petition], at ¶ 152; see ¶¶ 150-154; [Global Cash Card's Memorandum of Law], Point II); and (3) that certain provisions relating to payroll debit cards are vague, irrational, and/or unreasonable (see id., Exhibit B [Global Cash Card's Administrative Petition], at ¶¶ 156-161; [Global Cash Card's Memorandum of Law], Point III).

A distinction must be drawn between two distinct types of overreaching by an administrator in the promulgation of regulations. The first is a delegation/separation of powers issue that may arise when an agency intrudes into the legislature's constitutional domain by using a general delegation of power to administer laws enacted by the legislature "as a basis for drafting a code embodying its own assessment of what public policy ought to be" (Boreali v Axelrod, 71 NY2d 1, 9 [1987]). Analysis of whether the administrator has violated the constitutional separation of powers involves review of four factors as set forth in Boreali: first, whether the administrator has engaged in the weighing of societal issues and engaged in policy-making rather than implementing rules to promote

goals that have been expressed in legislative enactments; second, whether the administrator acted to fill interstices within statutes or instead wrote a comprehensive set of rules upon a clean slate; third, whether the subject area of the promulgation has been a contested issue on which the legislature has repeatedly been unable to reach agreement in the face of substantial public debate and vigorous lobbying; and fourth, whether development of the regulation required expertise or special competence within the administrator's field (see Boreali v Axelrod, 71 NY2d, at 12-14). Respondent Global Cash Card's administrative challenge to Part 192 was grounded in its assertion that petitioner had violated the separation of powers doctrine, *i.e.*, that petitioner had usurped legislative authority. Respondent IBA, although referencing record material relating to petitioner's area of expertise and prior failed legislative attempts to address the use of payroll debit cards, did not engage in a Boreali analysis, and did not conclude that petitioner had violated the separation of powers doctrine, as argued by respondent Global Cash Card.³

Rather, respondent IBA's Resolution of Decision stated that petitioner had exceeded the rule-making authority granted to her by Labor Law § 199 because "these regulations go beyond regulation of the employment relationship and into the area of banking law" (Kerwin Affirmation, Apr. 24, 2017, Exhibit E, at p.11). Such an action outside the scope of the Commissioner's delegated authority and intrusion into the realm of another executive agency's area of expertise is an issue fundamentally distinct from a violation of the balance of powers as between the legislative and

³ Inasmuch as respondent IBA did not analyze or decide whether petitioner had violated the separation of powers doctrine, and as the Court's function in a proceeding pursuant to Article 78 is limited to review the administrative determination, this Court declines to conduct a de novo Boreali analysis, as presented by respondent Global Cash Card (see Respondent Global Cash Card Inc.'s Memorandum of Law, dated July 12, 2018, at pp. 9-25).

executive branches. This issue was not presented to the IBA by respondent Global Cash Card, nor was there an adequate factual basis upon which to reach such a conclusion. That certain legislators were concerned that petitioner had not consulted with DFS was shown to be unfounded, as discussed below, and the fact that debit cards are a banking device does not necessarily mean that the use of payroll debit cards is not a matter to be regulated within the employer/employee relationship. Indeed, petitioner demonstrated to this Court, over respondent Global Cash Card's objection, that:

“DFS had reviewed, during the public comment period, [petitioner's] proposed regulation 12 NYCRR 192 concerning New York employers' use of reloadable payroll cards to pay their employees, and determined that the rule raised no issues warranting comments from DFS. [Petitioner's] payroll card regulations do not impinge on or interfere with DFS's regulatory authority. DFS communicated this point to [petitioner] prior to [petitioner] putting forth its proposed payroll card rule for public review and comment. The rules cover the employer-employee relationship and the payment of wages in New York, which DFS does not regulate.”

(Montgomery Affirmation, ¶ 6).⁴ Respondent Global Cash Card points to nothing in the

⁴ Respondent Global Cash Card's motion to strike the Montgomery Affirmation, among other documents, from the record of this Article 78 proceeding, was denied in this Court's prior decision:

“[Respondent Global Cash Card argued that] the materials were not part of the stipulated record that was presented to respondent IBA and that petitioner did not submit these materials as a supplement to the record when given an express opportunity to do so . . . and that these documents are not properly before the Court upon judicial review of the administrative determination because they were not part of the administrative record before respondent IBA . . . [However], it was not until respondent IBA issued its decision that the issue of her interaction with the DFS and her inquiries into the scope of her authority versus that of banking regulators was an issue in the administrative proceeding. Notably, respondent Global Cash Card's petition to the IBA did not raise the issue of petitioner's alleged intrusion into the banking and financial sectors – the administrative petition's challenge to the petitioner's authority was limited to whether petitioner had engaged in policy-making and had thus intruded into the legislative domain. Nor was the issue addressed or debated during oral argument before respondent IBA (see Kerwin Affirmation, Exhibit D)”

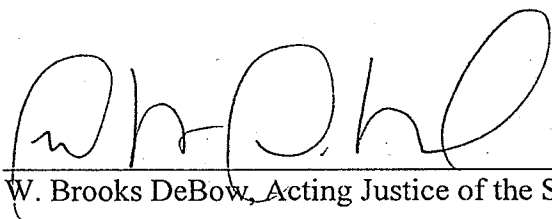
administrative record that supports respondent IBA's determination that "the regulations exceed respondent's rulemaking authority and encroach upon the jurisdiction of banking and financial services regulators" (Kerwin Affirmation, Apr. 24, 2017, Exhibit E, at p. 11). Thus, respondent IBA's determination was arbitrary and capricious and irrational because it was not raised by respondent Global Cash Card in the administrative proceeding as a ground to revoke the rule-making and lacked foundation in the administrative record.

Accordingly, even if the Resolution of Decision was not overbroad, or even if it was overbroad and the matter could be remitted to respondent IBA to correct the Resolution of Decision, the Article 78 petition would still have been granted because respondent IBA's determination that petitioner had exceeded her rulemaking authority by intruding into the rule-making domain of DFS and was arbitrary and capricious and not rational.

Accordingly, it is

ORDERED, that upon reargument, the Court adheres to the prior Decision, Order and Judgment annulling the Resolution of Decision of the Industrial Board of Appeals dated February 16, 2017.

Dated: Saratoga Springs, New York
February 20, 2019



W. Brooks DeBow, Acting Justice of the Supreme Court

Papers considered:

- (1) Verified Petition, sworn to April 17, 2017, with Exhibits A-B;
- (2) Affirmation of Adrienne J. Kerwin, AAG, in Support of Order to Show Cause, dated April 17, 2017, with Exhibits A-B;
- (3) Affirmation of Adrienne J. Kerwin, AAG, dated April 24, 2017, with Exhibits A-E;
- (4) Affirmation of Brian Montgomery, Esq., dated April 20, 2017;
- (5) Affidavit of Pico Ben-Amotz, Esq., sworn to April 24, 2017, with Exhibit A;
- (6) Memorandum of Law in Support of Verified Petition, dated April 24, 2017;
- (7) Affidavit of Devin A. Rice, Esq. in Response to Order to Show Cause, sworn to June 2, 2017, with Exhibits A-B;
- (8) Reply Affirmation of David B. Morgen. Esq., dated June 14, 2017, with Exhibit A;
- (9) Verified Answer of Respondent New York State Industrial Board of Appeals, sworn to December 4, 2017;
- (10) Verified Answer of Respondent Global Cash Card, Inc., sworn to December 7, 2017;
- (11) Affirmation of David B. Morgen. Esq., dated December 8, 2017, with Exhibit A (Supplemental Affidavit of Joseph M. Purcell, sworn to January 31, 2017, with Exhibit A);
- (12) Respondent Global Cash Card, Inc.'s Memorandum of Law in Support of its Motion for Leave to Renew and/or Reargue its Opposition to the Petition, dated July 12, 2018;
- (13) Affirmation of Kevin Lynch, AAG, in Opposition to Motion for Leave to Renew and/or Reargue, dated August 20, 2018, with Exhibits 1-4;
- (14) Reply Affirmation of David B. Morgen, Esq., dated August 29, 2018;
- (15) Reply Memorandum of Law in Support of Verified Petition, dated November 1, 2018

Decision and Order in Matter of Reardon v Global Cash Card, Inc. and New York State Industrial Board of Appeals, Albany County Index No. 2643-17 (W. Brooks DeBow, A.J.S.C., October 15, 2017);

Order in Matter of Reardon v Global Cash Card, Inc. and New York State Industrial Board of Appeals, Albany County Index No. 2643-17 (W. Brooks DeBow, A.J.S.C., October 26, 2017);

Decision, Order and Judgment in Matter of Reardon v Global Cash Card, Inc. and New York State Industrial Board of Appeals, Albany County Index No. 2643-17 (W. Brooks DeBow, A.J.S.C., May 23, 2018);

Oral Argument on November 14, 2018, with transcription thereof.



COURT OF CLAIMS
STATE OF NEW YORK

 COPY

HON. W. BROOKS DEBOW
JUDGE

Acting Supreme Court Justice

FILE

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February 20, 2019

Kevin M. Lynch, AAG
Office of NYS Attorney General
The Capitol
Albany, New York 12224-0341

Re: Matter of Reardon v Global Cash Card, Inc. And NYS Industrial Bd. of Appeals
Index No.: 2643-17

Dear Mr. Lynch,

Enclosed is the original executed Decision and Order with regard to the above matter, which is being forwarded to you for filing and service. A copy of the Decision and Order and all of the papers submitted on the matter have been sent to the County Clerk for placement in the file.

Very truly yours,

W. Brooks DeBow
Acting Supreme Court Justice

Enc.

cc: (w/enc.)

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Amy Moore, Special Term Clerk

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