

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

ASSOCIATION OF MOTOR VEHICLE
TRIAL ATTORNEYS, INC.,

Plaintiff-Petitioner,

-against-

DECISION AND
ORDER/JUDGMENT

Index No.: 905607-20

RJI No.: 01-20-ST1181

NEW YORK STATE DEPARTMENT OF MOTOR
VEHICLES, MARK J.F. SCHROEDER, in his official
capacity as the Commissioner of the New York State
Department of Motor Vehicles, NEW YORK STATE
DEPARTMENT OF MOTOR VEHICLES, TRAFFIC
VIOLATIONS BUREAU,

Defendants-Respondents.

(Supreme Court, Albany County, Special Term)

(Justice Kimberly A. O'Connor, Presiding)

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O'CONNOR, J.:

Plaintiff-petitioner Association of Motor Vehicle Trial Attorneys, Inc. ("AMVTA" or
"Association") commenced this combined CPLR Article 78 proceeding and action for declaratory

judgment challenging certain changes made by defendants-respondents New York State Department of Motor Vehicles (“DMV”), Mark J.F. Schroeder, in his official capacity as Commissioner of the New York State Department of Motor Vehicles (“DMV Commissioner” or “Commissioner”), and New York State Department of Motor Vehicles, Traffic Violations Bureau (“TVB”) (collectively “defendants-respondents”) to the manner in which contested traffic violation hearings are conducted in the TVB. Specifically, AMVTA alleges that the defendant-respondent’s decision to permit police officers to participate and testify in contested TVB hearings by telephone is in direct conflict with existing statute, rules, and regulations, offends due process, violates State rulemaking requirements, and is defective facially as well as empirically in practice. By this action and proceeding, AMVTA seeks an order and judgment: (1) pursuant to CPLR Article 78, compelling defendants-respondents to cease the unlawful, arbitrary and capricious policy/practice of permitting police officers to participate and testify by telephone at contested traffic violation hearings, and to adhere to the applicable rules and regulations governing such hearings; (2) pursuant to CPLR § 3001, declaring the policy/practice of permitting police officers’ telephonic participation and testimony at TVB hearings unlawful, as both *ultra vires* and a violation of due process, absent the informed consent of the ticketed motorist; and (3) awarding AMVTA its costs and attorneys’ fees. Defendants-respondents answered the verified complaint-petition and oppose the requested relief. AMVTA has replied to the opposition.

Background

AMVTA is a not-for-profit attorney trade association with more than fifty (50) member law firms and solo practitioners (*see* petition, ¶ 12). The Association’s members regularly appear and represent motorists in proceedings before the TVB (*id.*). AMVTA represented motorists before the TVB in connection with more than 100,000 traffic tickets in 2019 and approximately

25,000 tickets between January 1, 2020 and March 18, 2020 before the TVB's closure in response to the COVID-19 pandemic (*id.*).

Pursuant to Article 2-A of the Vehicle and Traffic Law ("VTL"), the TVB was created, within the DMV, to administratively adjudicate noncriminal, moving traffic violations that occur within the five boroughs of New York City (*see* VTL § 225; 15 NYCRR § 121.1, *et seq.*). As relevant here, there are eight (8) TVB hearing locations in New York City: two (2) in Brooklyn; two (2) in Manhattan; two (2) in Queens; one (1) in the Bronx; and one (1) in Staten Island (*see* petition, ¶ 16; affirmation of Bushra Vahdat, Esq., ¶ 1). Proceedings before TVB are quasi-judicial in nature and presided over by DMV Administrative Law Judges ("ALJs") in accordance with rules and regulations promulgated by the Commissioner governing the conduct of TVB hearings (*see* VTL § 225[3], § 227[1]; 15 N.Y.C.R.R. § 124.1-124.10).

TVB Proceedings – Statutory and Regulatory Framework

A motorist ticketed with a traffic infraction is required to answer the charge, pleading guilty or not guilty (*see* VTL § 226[2]; 15 N.Y.C.R.R. § 123.3, § 123.7). A motorist who pleads not guilty is scheduled to appear before the TVB for a hearing (*see* VTL §226[2][c]; 15 N.Y.C.R.R. § 123.7). During a TVB hearing, the motorist has the right to the assistance of counsel or other representative; the right to testify and present evidence and witnesses on his or her own behalf; and the right to cross-examine adverse witnesses, among other rights (*see* 15 N.Y.C.R.R. § 124.1[b], § 124.2, § 124.4[c], § 124.7[b]). The burden of proof rests with the People, i.e., the charging police officer, who must present evidence sufficient to establish each material element of the charge by clear and convincing evidence (*see* VTL § 227[1]; 15 N.Y.C.R.R. § 124.1[b], § 124.4[a]). The Civil Practice Law and Rules and the Criminal Procedure Law are not binding on the TVB, and the discovery procedures set forth in those statutes do not apply to TVB

proceedings (*see* 15 N.Y.C.R.R. § 123.1). Further, except as provided in regulations, the rules governing the receipt of evidence in a court of law do not apply in TVB hearings (*see* 15 N.Y.C.R.R. § 124.5).

The Administrative Law Judge (“ALJ”) is required to call the police officer to testify at the TVB hearing and may question the officer for the purpose of clarifying evidence already presented (*see* 15 N.Y.C.R.R. § 124.4[a]-[b]). However, the ALJ may not ask leading questions addressed to the material elements of the charge, which have been omitted from the police officer’s testimony (*see* 15 N.Y.C.R.R. § 124.4[b]). After the People’s case has been presented, the motorist may testify on his or her own behalf and may call witnesses (*see* 15 N.Y.C.R.R. § 124.4[c]). Moreover, any testifying witness may be examined by the ALJ and questioned by an adverse party, documentary evidence may be introduced by any party, and the police officer and motorist or his or her representative may make closing statements after all evidence has been received (*see* 15 N.Y.C.R.R. § 124.4[c]-[d]). At the conclusion of the TVB hearing, the ALJ considers all of the arguments and evidence in the record and announces whether or not the charge has been sustained by clear and convincing evidence (*see* VTL § 227[3]; 15 N.Y.C.R.R. § 124.4[d]). If the motorist is found guilty of the charge, the ALJ may impose any penalty authorized by the VTL, including the suspension or revocation of a motorist’s driver’s license and/or vehicle registration and the imposition of fines (*see* VLT § 227[4][a]; 15 N.Y.C.R.R. § 124.7[a]; VTL § 1809).¹

Telephonic Participation and Testimony of Police Officers at TVB Proceedings

¹ A motorist can appeal an adverse determination of the TVB to the Motor Vehicles Appeals Board (“MVAB”) (*see* VTL § 228; 15 N.Y.C.R.R. § 126.1). Thereafter, an appeal of an MVAB determination may be reviewed in a CPLR Article 78 proceeding (*see* VTL § 228[9]; 15 N.Y.C.R.R. § 126.5).

Prior to the onset of the COVID-19 pandemic, the TVB conducted approximately 800,000 hearings each year (*see* Vahdat affirmation, ¶ 6).² Hearings were held in-person with upwards of 20 people in the hearing room at a time, including motorists, witnesses, attorneys, and police officers, with an additional 50 people in the waiting area (*id.*). On March 18, 2020, TVB offices shut down in response to the COVID-19 pandemic, and approximately 150,000 hearings were cancelled (*id.*, ¶¶ 7-8). To conduct hearings safely and reopen as soon as possible, the DMV implemented a plan whereby the TVB would have only one case in a hearing room at a time (*id.*, ¶ 9). The motorist, motorist’s attorney, witnesses, ALJ, and a clerk would be in the hearing room, and the police officer would appear telephonically (*id.*).³ Further, the DMV made arrangements to have police officers send documentation related to the alleged violation, including the ticket and the officer’s notes, to the TVB prior to the hearing (*id.*, ¶ 14).

Defendants-respondents claim that “[i]n order to make the community aware of [the] new procedures and engage in public outreach to stakeholders,” the DMV invited “all known defense attorneys,” including some of AMVTA’s members, to a WebEx meeting on July 15, 2020 (*see* Vahdat affirmation, ¶ 19; petition, ¶ 27).⁴ At the meeting, the TVB’s Supervising ALJ explained the new procedure in which police officers would be appearing telephonically at hearings (*id.*). The first TVB hearings with officers appearing by telephone were held two days later, on July 17,

² Approximately 850,000 TVB hearings were held in 2019 (*see* Vahdat affirmation, ¶ 6).

³ According to defendants-respondents, the DMV agreed to allow police officers to appear by telephone at the request of the New York City Police Department and to protect DMV employees and the public from the spread of COVID-19 (“NYPD”) (*see* Vahdat affirmation, ¶¶ 10, 12-13). AMVTA claims, upon information and belief, that it was the DMV, through the TVB’s Supervising ALJ, that approached the NYPD and informed the relevant commanders that the TVB planned to conduct hearings telephonically and later virtually, and the NYPD merely cooperated with the DMV’s independent determination (*see* verified reply of Kimberly Samantha Juszcak, Esq., ¶ 6).

⁴ AMVTA avers, in reply, that the July 15, 2020 WebEx meeting “was exclusively for attorneys that primarily practice in the Queens North TVB location,” and that “during [the] meeting, attorneys who were not ‘regulars’ of the Queens North location were berated and told to leave” (Juszcak verified reply, ¶ 4). The Association further asserts that “[t]he only notice all other attorneys received prior to July 17, 2020 was through the ‘grapevine’ of the AMVTA” (*id.*).

2020 (*see* Vahdat affirmation, ¶ 16). On July 30, 2020, the DMV held a second WebEx meeting “again to perform outreach to the community,” according to defendants-respondents⁵ (*id.*, ¶ 21). During the meeting, some of the motor vehicle trial attorneys raised issues and concerns they had with police officers appearing by telephone, and the TVB’s Supervising ALJ acknowledged that “[t]here are some glitches” with the new procedure (7/30/2020 WebEx meeting tr. at 9-10, 13-20).⁶ The Supervising ALJ also indicated, among other things, that the DMV was considering moving to virtual hearings entirely (*see* Vahdat affirmation, ¶ 23; 7/30/2020 WebEx meeting tr. at 11-12, 37-38).

TVB’s Transition to Virtual Hearings

According to defendants-respondents, the DMV began examining whether TVB hearings could be conducted by entirely virtual means at the outset of the pandemic (Vahdat affirmation, ¶ 25). They aver that when funding was secured in October 2020, the DMV launched a project to transition all TVB hearings to be completely virtual (*see id.*). Beginning on February 24, 2021, the DMV transitioned all TVB offices to virtual hearings (*id.*, ¶ 26).⁷ Defendants-respondents aver that since all TVB offices have transitioned to virtual hearings, police officers no longer testify by

⁵ AMVTA claims that the “community” the defendants-respondents notified of the new procedure for police officers “was limited to attorneys that regularly appear” and that there was “no notice to either the rest of New York State’s Bar or the driving public at large” (Juszczak verified reply, ¶ 5). The Association further maintains that the change in procedure was not on the DMV’s website, and that “anyone who did not receive an invitation to the WebEx meeting, or have regular contact with someone who did, entered the TVB on July 17th completely blindsided by the fact that the officers were not [there]” (*id.*).

⁶ Defendants-respondents submit that the July 30, 2020 WebEx meeting was “secretly recorded” by a member of AMVTA “without DMV’s permission or otherwise notifying [the] DMV of the intent to record the meeting,” and that “the transcript proffered by [the Association] is not a document prepared by [the] DMV or based upon a recording of a meeting prepared by [the] DMV” (Vahdat affirmation, ¶ 24). Defendants-respondents, however, do not challenge the content of the transcript and have not objected to its consideration by the Court in this proceeding and action.

⁷ The Association commenced a second hybrid action and proceeding on January 27, 2021 challenging the TVB’s policy/practice of conducting contested traffic violation hearings by remote video teleconference without the ticketed motorist’s affirmative election and informed consent, which is pending before this Court (*see Ass’n of Motor Vehicle Trial Attorneys, Inc. v. New York State Dep’t of Motor Vehicles*, Sup. Ct, Albany County, O’Connor, J., index No. 900856-21).

telephone, except in rare instances where technological problems prevent the officer from participating by video conference (*id.*, ¶¶ 4, 27).

TVB's Resumption of In-Person Hearings

By correspondence from defendants-respondents' counsel, dated June 11, 2021, the Court was informed that as of June 1, 2021, the TVB resumed in-person hearings, and that police officers will appear and testify in person at TVB hearings (*see* Correspondence from Christopher J. Hummel, Esq., DMV press release, June 1, 2021). Counsel indicated that motorists would continue to be offered the option of appearing virtually if the motorists so choose.

Arguments

AMVTA argues that the implementing rules and regulations expressly require police officers to attend, participate, and testify in person at contested TVB hearings. The Association cites to language in 15 N.Y.C.R.R. § 123.7(a) and (b), which provides that “[t]he police officer will . . . be notified *to attend* and a hearing will be held”; 15 N.Y.C.R.R. § 124.4(a), which states that “[t]he [ALJ] will call the police officer . . . *to the dais* [and] [a]fter the charge is read, *the police officer will testify*”; 15 N.Y.C.R.R. § 124.4(c), which permits “[t]he [ALJ] [to] exclude any witness, *except the motorist or police officer*, during the testimony of another person”; 15 N.Y.C.R.R. § 124.1(b), acknowledging “the right to cross-examine adverse witnesses”; and 15 N.Y.C.R.R. § 124.9, addressing a “[p]olice officer’s failure to appear for hearing” to support such claim (emphasis added in verified complaint-petition). The Association further asserts that “the assignment of prosecutorial responsibilities to the police officer in and of itself contemplates and requires the officer’s in-person attendance at contested hearings.” Moreover, AMVTA contends

that “the limited ‘[e]xception’ to strict compliance carved out in 15 N.Y.C.R.R. § 125.7” does not justify defendants-respondents’ adoption of the new procedure for police officers.

Next, the Association argues that police officers’ participation in TVB hearings telephonically violates the State Administrative Procedure Act (“SAPA”) and Article IV, § 8 of the New York State Constitution and is, therefore, null and void as a matter of law. AMVTA asserts that the new procedure constitutes a rule change, and submits that the DMV Commissioner has not filed a notice of the change with the Secretary of State or made any attempt to substantially comply with SAPA’s rulemaking requirements. The Association also maintains that none of the Executive Orders issued by the Governor’s Office in response to the COVID-19 State of Emergency expressly or implicitly suspended SAPA, the Secretary of State filing requirement, or otherwise authorized defendants-respondents’ adoption of the new rule.

Additionally, AMVTA argues that allowing police officers to testify by telephone violates due process by depriving motorists of their right to: (1) effective cross-examination; (2) an impartial adjudication; and (3) adequate notice. The Association submits that motorists have a limited due process right to confront and cross-examine adverse witnesses in administrative proceedings, which includes reasonable access to information and materials, the ability to present an adverse witness with evidence, and the ability to confirm the identity of the testifying officer. AMVTA asserts that the DMV’s new procedure “effectively constrains the motorists’ access to police records and documents concerning their violation to whatever documents and materials the officer elected to email/[fax] the ALJ [the] morning [of the hearing]” and “limits motorists’ access to only printouts of scans or facsimiles of those records, which are often of inferior quality, adversely impacting the motorist’s ability to conduct an effective, informed and knowledgeable cross-examination.”

The Association points to the affirmations and affidavits of attorneys and motorists who have appeared before the TVB, submitted in support of its verified complaint-petition, “illustrat[ing] the due process violations inherent in handing evidence in this fashion.” AMVTA notes that in one case, for example, an officer, on cross-examination, “indicated that she had no recollection of the incident and was reading solely from her notes, a copy of which was submitted to the court” (affirmation of Michael Elliot Beer, Esq., ¶ 13). According to the attorney representing the motorist, “[t]he notes included a copy of original ticket, but each and every handwritten notation on the copy was illegible” (*id.*, ¶ 13). After objecting to the lack of legible notes, the attorney “asked the officer if any of her notes contained a notation that [his] client was in motion (a necessary element to the charge), to which she replied that it was in the copy of the original summons” (*id.*). The attorney “objected to the inability to be able to verify that the notes contained such notation” (*id.*) “[D]espite the absence of the officer in person, as well as the absence of a full and complete set of notes and records, the ALJ convicted the motorist, five points were assessed on his license, a fine was imposed, and due to excessive points [his] client was suspended for 31 days” (*id.*).

The Association notes another case where, “[o]n cross-examination, the officer admitted he had no recollection of the incident and that he was reading from a script” (affirmation of Kimberly Samantha Juszczak, Esq., ¶ 28). “When asked what he used to create the script, [the officer] said ‘his notes’ that he ‘took at the time of the stop’” and “stated he did not turn his notes in to the court” (*id.*). The attorney representing the motorist “asked for dismissal based upon [her] inability to cross examine him without seeing the notes when the officer has no independent recollection” (*id.*). “The motorist was convicted and received two points on his license” (*id.*).

AMVTA further contends that “effective cross-examination must include the right to ask adverse witnesses questions about evidence other than what that particular witness produced.” The Association submits that under the new procedure “the motorist cannot present the [police] officer with photographs, video, diagrams, etc. or ask the officer to read provisions of the VTL” and “has to rely on the ALJ to ‘translate’ for the officer over the phone.” AMVTA also asserts that the ability to confirm the identity of the testifying officer is essential to effective cross-examination, and submits that “[w]hile the need to verify and confirm that the testifying officer is in fact who they say they are is rarely necessary when cross-examining the officer face-to-face, the need becomes more pressing when the testifying officer is just a voice emanating from a speakerphone.” The Association claims that “[i]t likewise becomes difficult to tell if the officer is receiving assistance from unnamed, off-receiver collaborators.”

Relying on the supporting attorney affirmations and motorist affidavits, AMVTA notes, for example, a case in which the self-represented motorist, an Uber driver, had a “video show[ing] construction on the road the day the cop pulled [him] over” and “showing how [he] didn’t make an illegal turn” (affidavit of Miguel Caballero, ¶¶ 6-7). The motorist “wanted the cop to look at the video and have him say this was how the street was that day[,] but he couldn’t because [the cop] wasn’t there” (*id.*, ¶ 16). According to the motorist, “the judge found [him] guilty with a video clearly showing [he] was in the left lane making a left[-]hand turn” (*id.*, ¶ 19). The Association points to another case in which the attorney “represented a motorist that was charged with three child seat belt violations” (affirmation of Kimberly Samantha Juszczak, Esq., ¶ 32). The attorney “presented the court with a photograph and asked the officer to identify if [the photograph] [was] the motorist and children in question” (*id.*). “The officer admitted [he or she]

was unable to do so because [he or she] [was] testifying by phone,” and “[t]he motorist was convicted of all three violations and suspended for thirty-one days”(id.).

In a third case mentioned by AMVTA, the attorney representing a motorist “charged with disobeying a traffic device . . . had pictures of the intersection that included a possible obstruction of the device in question” (affirmation of Kimberly Samantha Juszczak, Esq., ¶ 34). The attorney “asked the officer to look at the pictures and asked if [they] [were] an accurate representation of the intersection” (id.). The officer “was unable to do so,” and “[t]he motorist was convicted of the violation and received two points” (id.). Moreover, the Association notes a fourth case where “[d]uring [the] . . . hearing, the officer admitted that while [he or she] was testifying, [the officer’s] supervisor was sitting next to [him or her]” (id., ¶ 25). The attorney representing the motorist “was unable to observe whether or not the supervisor was assisting the police officer through their testimony” (id.).

According to AMVTA, “[t]he process by which evidence is conveyed to the TVB under [the new procedure] impermissibly blurs what should and must by law be a stark division between the roles of the prosecutor (ticketing officer) and impartial jurist (the ALJ).” Citing the supporting attorney affirmations and motorist affidavits, the Association contends that there have been numerous instances where the ticketing officer’s furnishing of evidence directly to the presiding ALJ under the new procedure “led to instances of improper assistance and bias by the ALJ.”

Furthermore, AMVTA argues that despite the TVB’s claims to the contrary, it “is unaware of any official notice or public announcement [about the new procedure for police officers] on the DMV’s website,” and maintains that “[f]rom the start, [defendants-][r]espondents have been less than forthright with the public about the [change].” The Association submits that the supporting motorists’ affidavits “demonstrate how, time and time again, motorists show up at the designated

TVB location for their hearing, prepared to confront the ticketing officer in-person, only to then learn – often from the ALJ during the hearing – that their accuser will be prosecuting the ticket remotely by speaker telephone.” Furthermore and citing examples from the supporting motorists’ affidavits, AMVTA claims that the “ALJs have proven reluctant to inform motorists of their entitlement under due process to inspect the ticket and the officer’s related notes, scripts, or similar materials at the hearing.”

Moreover, the Association argues that it is entitled to an award of attorneys’ fees and costs under the New York State Equal Access to Justice Act (“EAJA”) as an eligible “[p]arty” and because “the challenges presented by COVID-19 are no justification for the DMV’s flagrant flouting of SAPA’s rulemaking requirements, and violation of its own rules and regulation and due process.”

Defendants-respondents, in opposition, argue that the petitioner’s challenge to the DMV’s policy/practice of having police officers testify by telephone at TVB hearings is now moot as the TVB has transitioned to virtual hearings. They note that police officers appear and testify by video conference, not by telephone, “except in rare instances where technological limitations prevent video conferencing.” As such, defendants-respondents submit that the petition must be dismissed.

Next, defendants-respondents claim that mandamus to compel is unavailable to AMVTA. They assert that the manner in which police officers appear and testify at TVB hearings “is plainly a discretionary determination of the [DMV].” Defendants-respondents also contend that no statute or regulation governing TVB hearings imposes a duty upon the Department to require police officers’ physical presence when testifying before the TVB, and that the DMV interprets its own regulations as permitting telephonic testimony. Defendants-respondents further argue that the Association “cannot demonstrate a clear legal right to [such] relief.”

Defendants-respondents submit that the language in 15 N.Y.C.R.R. § 123.7(a) and (b) that “[t]he police officer will be notified to attend” the hearing is “[f]ar from ‘expressly’ requiring in-person attendance.” Additionally, they maintain the 15 N.Y.C.R.R. § 124.4(a)’s passing reference to calling witnesses ‘to the dais’” as “requir[ing] in-person attendance is a stretch too far,” and that if the DMV intended to require in-person testimony, “establishing such a requirement through an oblique reference to calling witnesses ‘to the dais’ would seem a most unclear and unlikely manner of . . . doing [so].” They further assert that “[15 N.Y.C.R.R. §] 124.4(c)’s requirement that the [ALJ] may not exclude the motorist or police officer during the testimony of another witness does not require that the officer or motorist be physically present when other witnesses testify.” Moreover, according to defendants-respondents, 15 N.Y.C.R.R. § 124.1(b)’s reference to cross-examination and 15 N.Y.C.R.R. § 124.9’s reference to a police officer who does not appear for a hearing are not requirements that such cross-examination and appearance “be in[]person.”

Furthermore, defendants-respondents argue that AMVTA’s SAPA challenge is without merit and fails. Initially, defendants-respondents contend that the Association’s assertion of a SAPA violation in an Article 78 proceeding is procedurally improper. Quoting *Cnty. Charter Sch. v. Bd. of Regents of the Univ. of State of New York*, they assert that “[w]here an agency is alleged to have acted in violation of SAPA, the challenge is a declaratory judgment action, not a CPLR [A]rticle 78 proceeding” (2013 N.Y. Slip Op. 33840[U] [Supreme Court, Erie County 2013]). Defendants-respondents submit, however, that “a violation of the procedure set forth in SAPA § 202 is arguably reviewable as a ‘violation of lawful procedure’ under CPLR § 7803(3).”

Defendants-respondents argue that regardless of whether consideration is given under CPLR § 3001 or Article 78, petitioner’s SAPA claim is substantively meritless. They maintain that the “procedures governing hearings before the TVB are expressly exempt from SAPA

requirements.” To that end, defendants-respondents point out that adjudicatory proceedings are governed by SAPA § 300, *et seq.*, and that SAPA § 301(3) requires “[a]gencies [to] adopt rules governing the procedures on adjudicatory proceedings . . . in accordance with provisions of article two of [SAPA].” Citing SAPA § 102(3), defendants-respondents contend that “hearings before the TVB are expressly exempted from the definition of adjudicatory proceedings.” They further assert that even if the procedures governing TVB hearings were subject to SAPA’s requirements, permitting police officers to testify by telephone does not constitute the creation of a new rule within the meaning of SAPA “because . . . such testimony is permitted by the [DMV’s] interpretation of the existing regulatory framework for TVB hearings.” Defendants-respondents submit that as such, they have not violated SAPA, and petitioner is not entitled to declaratory relief to that effect.

In addition, defendants-respondents argue that “telephonic testimony does not interfere with . . . motorists’ confrontation rights under the New York State Constitution.” They contend that motorists and their attorneys remain able to question the accusing officer by telephone, and that AMVTA “has provided no support for the notion that telephonic testimony runs afoul of the New York State Constitution’s limited right to confrontation in non-criminal proceedings, or that the [S]tate [C]onstitution’s right to confrontation requires in-person cross-examination.” Defendant-respondents also submit, among other things, that the Association misrepresents the holding in *Lee Myles Assoc. Corp. v. Abram* as the Court “did not hold that cross-examination must be conducted in-person.”

Defendants-respondents also assert that AMVTA’s “argument that telephonic testimony violates the New York State Constitution because motorists do not receive all necessary documentation, or receive inadequate copies, strains credulity.” In that regard, they note that prior

to a TVB hearing, the police officer forwards the ALJ the officer's notes, ticket and any other pertinent documents or evidence, and that the motorist and the motorist's attorney may review and cross-examine the officer regarding those documents. According to defendants-respondents, the Association "presents no legal support for its novel argument that review of copies of such records, rather than originals, impairs the right to confrontation."

Defendants-respondents submit that "the alleged failure of an ALJ, in a particular hearing, to ensure that a motorist has access to legible copies of all appropriate documentation to permit effective cross-examination does not render telephone testimony violative of due process as a general matter," but "merely reflect purported errors on the part of an ALJ to ensure the motorist has access to documentation sufficient to permit effective cross-examination," and that any resulting adverse determination "is appropriately remedied on a case-by-case basis by appealing to the DMV Appeals Board and then commencing an appropriate civil [proceeding] under Article 78." Moreover, defendants-respondents contend that AMVTA has cited no authority for the proposition that the inability of a motorist to present the police officer testifying by telephone with evidence or to identify the accusing officer violates the right to confrontation. Defendants-respondents argue that "the policy of permitting officers to testify by telephone during the height of the pandemic was, at most, a limited imposition upon confrontation rights necessitated by the [DMV's] competing needs to protect the safety of the public by continuing the adjudication of traffic violations and mitigate public health risks posed by COVID-19 exposure."

Defendants-respondents claim that **check quote marks here** the receipt of documentation from the police officer in advance of a TVB hearing "does not establish, *ipso facto*, that an ALJ has reached prejudgment as to the facts or whether the motorist is guilty of the alleged violation." They further assert that an "ALJ's facilitation of the presentation of evidence at a TVB hearing

[would not] necessarily imply that the ALJ has reached predetermination,” and submit that AMVTA hasn’t “offered any legal support for the proposition that facilitating the police officer’s presentation of evidence during the hearing somehow prevents the ALJ from reaching a conclusion in favor of the motorist.” Additionally, defendants-respondents maintain that the alleged instances in which an ALJ reviewed documentation and consulted with the police officer prior to a hearing are not evidence that telephone testimony imparts bias upon the ALJ or that an ALJ is incapable of remaining impartial as the result of receiving documentation, and such “limited instances are appropriately remedied on a case-by-case basis by appeal and an appropriate civil action, if necessary.”

Moreover, according to defendants-respondents, AMVTA’s argument that the DMV violated due process by failing to notify motorists that police officers would testify telephonically “overstates the notice requirements of due process.” They contend that “[the Association] has offered no legal support for its contention that motorists must be explicitly notified of each and every granular procedure employed by the TVB during a hearing, including the manner by which an officer will appear and testify.” Defendants-respondents submit that in any event, “[m]otorists scheduled for a hearing receive a hearing notice at least three weeks in advance of the hearing that provides the date, time and location of the hearing, and identifies the matter to be heard,” which “comports with due process.”

Finally, defendants-respondents argue that AMVTA’s application for attorneys’ fees and costs is premature as the Association has not prevailed in this matter. They additionally maintain that the application must be denied because, among other things, “the [DMV] was substantially justified in requiring police officers to appear and testify by telephone in light of the exigent circumstances imposed by COVID-19.”

In reply, the Association argues that the petition is not barred by the mootness doctrine. According to AMVTA, “because any judgment entered in [the Association’s] favor . . . will have the direct, immediate effect of barring [police] officers from continuing to prosecute traffic violations telephonically (in addition to the various collateral effects such a judgment is liable to have on past convictions), the original controversy at issue remains extant and the mootness doctrine does not apply.” Pointing to defendants-respondents’ concession that police officers continue to testify and prosecute traffic violation tickets by telephone, despite implementing virtual hearings, “where technological problems arise preventing participation by video conference,” AMVTA further asserts that “so long as [defendants-r]espondents continue to permit officers to telephonically prosecute some volume of tickets greater than zero, a presently justiciable controversy will be found to exist, barring the application of the mootness doctrine.”

The Association argues that even assuming, for sake of the argument, that police officers had in fact stopped prosecuting traffic violations by telephone after transitioning to virtual hearings, the present controversy falls within an exception to the mootness doctrine. In that regard, AMVTA notes that defendants-respondents have acknowledged, in their answering papers, that telephonic prosecutions are still permitted when there are technological issues with a police officer’s virtual participation. The Association submits that barring a court order, “no protections exist to restrict [defendants-r]espondents from resuming telephonic prosecutions when convenient or expedient for them to do so again.” Additionally, AMVTA contends that “because most of the fines assessed in TVB proceedings are less than \$500, it is unrealistic to expect a convicted motorist to invest the significant time and resources required to exhaust their administrative remedies, commence and prosecute an Article 78 [proceeding]/declaratory judgment action through judgment and then, if successful, defend their judgment on appeal.” Furthermore the

Association asserts that “this [proceeding and] action raises significant and important questions regarding procedural due process, the scope of agency authority, rules of statutory construction, and the requirements of SAPA, all in the pretextual backdrop of a global pandemic.”

Moreover, AMVTA points out that in their answer, defendants-respondents raise, as an objection in point of law, that “the petition fails, in part, to state a cause of action.” The Association maintains that defendant-respondents have failed to reference this objection in their memorandum of law, and have failed to submit any argument, allegations, or factual information enabling the Association to discern which “part” of the petition fails to state a cause of action and why. As such, AMVTA claims that no response is warranted. To the extent a response is required, the Association “den[ies] the . . . objection categorically.”

In their June 11, 2021 correspondence to the Court, defendants-respondents claim that this action and proceeding has been rendered moot inasmuch as their initial decision to permit police officers to testify telephonically and their subsequent decision to hold TVB hearings by videoconference “are no longer in effect.”

In response, AMVTA claims that “[a]lthough the virtual hearings are now voluntary (for the time being at least), the manner in which [defendants-r]espondents conduct virtual hearings continue to violate due process, and stopping such violations remains part and parcel of the relief sought.” The Association also submits that “in addition to being freely reversible, [defendants-r]espondents’ policy change only applies prospectively and thus does nothing to address the thousands of motorists whose rights the [defendants-r]espondents violated by their previous policies.” Moreover, AMVTA contends that “[a] judicial declaration that [a] remote hearing process is illegal is a declaration that any guilt or penalty assessed by that process is also illegal, and thus the entry of judgment in [the Association’s] favor will have the collateral effect of

redressing the rights of aggrieved motorists, who by virtue of the judgment, can then seek a new hearing if not outright reversal.” According to AMVTA, “[defendants-r]espondents’ policy change does not afford motorists any such relief and ignores [defendants-r]espondents’ violation of their rights altogether, and therefore does not moot [this] action.”

Standards of Review

When reviewing an administrative action, the issue before the Court is whether the action “was affected by an error of law, was arbitrary or capricious or lacked a rational basis.” (*Matter of Biggs v. Eden Renewables LLC*, 188 A.D.3d 1544, 1548 [3d Dep’t 2020]; see *Matter of Adirondack Wild: Friends of the Forest Pres. v. New York State Adirondack Park Agency*, 34 N.Y.3d 184, 191 [2019]; CPLR § 7803[3]). “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*, 12 N.Y.3d 424, 431[2009]; accord *Matter of Murphy v. New York State Div. of Hous. & Community Renewal*, 21 N.Y.3d 649, 652 [2013]; see *Matter of Pell v. Bd. of Educ. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 N.Y.2d 222, 231 [1974]). If the Court finds that the administrative action is supported by a rational basis, the action will be sustained (see *Matter of Peckham v. Colagero*, 12 N.Y.3d at 431; *Matter of Spence v. New York State Dep’t of Agric. & Mkts.*, 154 A.D.3d 1234, 1238 [3d Dep’t 2018], *aff’d* 32 N.Y.3d 991 [2018]).

Further, “[a] writ of mandamus ‘is an extraordinary remedy that is available only in limited circumstances’” (*Alliance to End Chickens as Kaporos v. New York City Police Dep’t*, 32 N.Y.3d 1091, 1093 [2018], quoting *Matter of County of Chemung v. Shah*, 28 N.Y.3d 244, 266 [2016][further internal quotation marks and citation omitted]). “Such remedy will lie ‘only to enforce a clear legal right where [a] public official [or governmental agency] has failed to perform

a duty enjoined by law” (*id.*, quoting *New York Civil Liberties Union v. State*, 4 N.Y.3d 175, 184 [2005]; see *Matter of County of Fulton v. State*, 76 N.Y.2d 675, 678 [1990]). Thus, “[w]hile mandamus to compel ‘is an appropriate remedy to enforce the performance of a ministerial duty, . . . it will not be awarded to compel an act . . . to which a public officer [or governmental entity] may exercise discretion” (*id.*, quoting *Klostermann v. Cuomo*, 61 N.Y.2d 525, 539 [1984][brackets, further internal quotation marks, and further citation omitted]). A discretionary act “involve[s] the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result” (*New York Civil Liberties Union v. State*, 4 N.Y.3d at 184 [internal quotation marks and citation omitted]). Moreover, mandamus will lie only to compel the performance of a legal duty, but not to direct how that duty is to be performed (*see Alliance to End Chickens as Kaporos v. New York City Police Dep’t*, 32 N.Y.3d at 1093; *Klostermann v. Cuomo*, 61 N.Y.2d at 540).

Moreover, pursuant to CPLR § 3001, “[t]he supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed.” “The general purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations” (*James v. Alderton Dock Yards*, 256 N.Y. 298, 305 [1931]). Notably, “[t]he granting of declaratory relief is discretionary” (*Bd. of Educ. of Freeport Union Free Sch. Dist. v. Nyquist*, 50 N.Y.2d 889, 891 [1980]), and “dependent upon facts and circumstances rendering it useful and necessary” to the parties (*James v. Alderton Dock Yards*, 256 N.Y. 298, 305 [1931]; see *Walsh v. Andorn*, 33 N.Y.2d 503, 507 [1974]).

Discussion

Initially, the Court is not persuaded that this proceeding and action has been rendered moot by the TVB's transition to virtual hearings and its subsequent return to in-person hearings. "As a general principle, courts are precluded from considering questions which, although once live, have become moot by passage of time or change in circumstances" (*City of New York v. Maul*, 14 N.Y.3d 499, 507 [2010], quoting *Matter of Hearst Corp. v. Clyne*, 50 N.Y.2d 707, 714 [1980]; accord *Matter of Dixon v. County of Albany*, 192 A.D.3d 1428, 1429 [3d Dep't 2021]). Typically, an action and/or proceeding "will be considered moot unless the rights of the parties will be directly affected by the determination . . . and the interest of the parties is an immediate consequence of the judgment" (*Matter of Gonzalez v. Annucci*, 32 N.Y.3d 461, 470 [2018], quoting *Matter of Hearst Corp. v. Clyne*, 50 N.Y.2d at 714). Although defendants-respondents claim that their "initial decision to permit police officers to testify telephonically" is "no longer in effect," they do not aver that such policy/practice has permanently ceased in TVB hearings. Nor have they taken the position that the DMV will not resume such policy/practice if a suspension of in-person hearings again occurs and/or other circumstances so require. Nevertheless, the parties' rights and interests would be directly affected by the Court's determination inasmuch as a judgment in favor of AMVTA would preclude defendants-respondents from permitting police officers to appear and testify by telephone at TVB hearings going forward and would allow aggrieved motorists, including clients of the Association's members, to seek redress for past convictions resulting from TVB hearings where police officers appeared and testified telephonically.

However, even if defendants-respondents' policy/practice of permitting police officers to appear and testify by telephone at TVB hearings is, in fact, no longer in effect rendering this action

and proceeding moot, “an exception to the mootness doctrine [exists], permitting judicial review, where the issues are substantial or novel, likely to recur, and capable of evading review” (*City of New York v. Maul*, 14 N.Y.3d at 507; see *Matter of Hearst Corp. v. Clyne*, 50 N.Y.2d at 715; see *Matter of Dixon v. County of Albany*, 192 A.D.3d at 1429). This proceeding and action implicates significant and important questions of statewide concern involving, among other things, the due process rights of motorists who appear before the TVB and are subject to penalties, including monetary fines and suspension and revocation of their driving privileges. Further, since there is nothing in the record to suggest that the DMV will not resume the policy/practice of permitting police officers to appear and testify telephonically at TVB hearings under any circumstances, because the record reveals that the defendants-respondents continued to permit police officers to appear and testify by telephone at contested TVB hearings following a transition to virtual hearings, and given that the COVID-19 pandemic remains an ongoing threat to public health and safety, the issues raised by the Association are likely to recur. Moreover, as convicted motorists cannot be expected to invest the significant time and resources required to pursue their administrative and civil remedies, when, according to AMVTA, “most of the fines assessed in TVB proceedings are less than \$500,” the issues raised here are also capable of evading review.⁸ For those reasons, the Court will address the merits.

Turning first to the Association’s claim that the DMV’s implementing rules and regulations (i.e., 15 N.Y.C.R.R. §121.1-126-.7) expressly require police officers to attend, participate and testify in person at contested TVB hearings, “[a]s a general rule, ‘courts must defer to an

⁸ In reply, the Association proffers the affirmation of Kimberly Samatha Juszczak, Esq., an attorney who “makes numerous daily appearances at the . . . Traffic Violations Bureau.” Attorney Juszczak avers that “not a single conviction” of a motorist appealing their case because the motorist disagreed with telephonic testimony “has been reversed on [that] ground by the Department despite well preserved objections on the record by attorneys.” Counsel further submits that “[i]t is unreasonable to expect motorists to know to preserve the issue and then individually shoulder the burden of filing complicated and expensive Article 78s.”

administrative agency’s rational interpretation of its own regulations in its area of expertise” (*Andreyeyva v. New York Health Care, Inc.*, 33 N.Y.3d 152, 174 [2019], quoting *Matter of Peckham v. Calogero*, 12 N.Y.3d 424, 431 [2009]). “Thus, an agency’s construction of its regulations ‘if not irrational or unreasonably, should be upheld’” (*id.*, quoting *Samiento v. World Yacht Inc.*, 10 N.Y.3d 70, 79 [2008][further internal quotation marks and citation omitted]). “However, ‘courts are not required to embrace a regulatory construction that conflicts with the plain meaning of the promulgated language’” (*id.*, quoting *Visiting Nurse Serv. of New York Home Care v. New York State Dep’t of Health*, 5 N.Y.3d 499, 506 [2005]; see *Matter of 427 W. 51st St. Owners Corp. v. Div. of Hous. & Community Renewal*, 3 N.Y.3d 337, 342 [2004]).

Contrary to AMVTA’s arguments, the Court finds that nothing in the clear language of the cited rules and regulations requires police officers to appear and testify in person, as opposed to by remote means, at TVB hearings. Nor does the “assignment of prosecutorial responsibilities to the police officer in and of itself contemplates and requires the officer’s in-person attendance at contested hearings.” Further, defendants-respondents explained that the decision to permit police officers to appear and testify telephonically was made to reduce the risk of exposure, transmission, and spread of COVID-19 posed to TVB staff and hearing attendees by police officers’ in-person attendance, to reduce the burden on the New York City Police Department, which was suffering staffing shortages as a result of the high infection rate among its police officers, and to continue adjudicating traffic violations to protect the public from unsafe drivers. Under such circumstances, defendants-respondents’ interpretation of the DMV’s rules and regulations as permitting police officers to appear and testify remotely by telephone at TVB hearings does not conflict with the plain language of 15 N.Y.C.R.R. § 123.7(a) and (b), § 124.1(b), § 124.4(a) and (c), or § 124.9, and, as such, was neither unreasonable nor irrational or contrary to law.

Next, “[f]or purposes of rule-making notice and filing requirements . . . , a rule is defined as ‘the whole or part of each agency statement, regulation or code of general applicability that implements or applies law, or prescribes . . . the procedure or practice requirements of any agency, including the amendment, suspension or repeal thereof’ (*Matter of Bd. of Educ. of the Kiryas Joel Vil. Union Free Sch. Dist. v. State of New York*, 110 A.D.3d 1231, 1233 [3d Dep’t 2013], quoting SAPA § 102[2][a]; *accord Cubas v. Martinez*, 8 N.Y.3d 611, 621 [2007]). Notably, “only a fixed, general principle to be applied by an administrative agency without regard to other facts and circumstances relevant to the regulatory scheme of the statute it administers constitutes a rule or regulation required by N[ew] Y[ork] Constitution, [A]rticle IV, § 8 to be filed in the office of the Department of State” (*Roman Catholic Diocese of Albany v. New York State Dep’t of Health*, 66 N.Y.2d 948, 951 [1985]).

“Expressly excluded from the definition are ‘rules concerning the internal management of the agency which do not directly and significantly affect the rights of or procedures or practices available to the public’ . . . and ‘forms and instructions, interpretive statements and statements of general policy which in themselves have no legal effect but are merely explanatory’” (*Matter of Bd. of Educ. of the Kiryas Joel Vil. Union Free Sch. Dist. v. State of New York*, 110 A.D.3d at 1233, quoting SAPA § 102[2][b][i], [iv]; *see Matter of Elcor Health Servs. v. Novello*, 100 N.Y.2d 273, 279 [2003]; *Toledo v. Admin. for Children Servs.*, 112 A.D.3d 1209, 1210 [3d Dep’t 2013]). “There is no clear bright line between a ‘rule’ or ‘regulation’ and an interpretive policy” (*Cubas v. Martinez*, 8 N.Y.3d at 621; *accord Matter of Bd. of Educ. of the Kiryas Joel Vil. Union Free Sch. Dist. v. State of New York*, 110 A.D.3d at 1233). Furthermore, “[c]ourts have previously found administrative directives to be interpretive statements when they rely on and constitute reasonable interpretations of existing regulations or statutes,” among other things (*Matter of Bd. of*

Educ. of the Kiryas Joel Vil. Union Free Sch. Dist. v. State of New York, 110 A.D.3d at 1233-1234; *see Cubas v. Martinez*, 8 N.Y.3d at 621; *Matter of Elcor Health Servs. v. Novello*, 100 N.Y.2d at 279).

Notwithstanding the Association's claims to the contrary, the Court concludes that the defendants-respondents' decision to permit police officers to appear and testify at TVB hearings by telephone did not constitute a rule change requiring compliance with the rulemaking and filing requirements of SAPA and Article IV, § 8 of the New York State Constitution. Rather, it was a reasonable interpretation of the existing regulatory framework for conducting TVB hearings given the public health and safety concerns posed by the burgeoning COVID-19 global pandemic. For those reasons, mandamus to compel does not lie.

The Court, however, finds merit in AMVTA's contention that permitting police officers to appear and testify at TVB hearings by telephone, absent the informed consent of the ticketed motorist, violates due process. "It is well established that a driver's license is a substantial property interest" (*Pringle v. Wolf*, 88 N.Y.2d 426, 431 [1996], citing *Bell v. Burson*, 402 U.S. 535, 539 [1971]). In *Bell v. Burson*, the Supreme Court stated:

Once licenses are issued . . . , their continued possession may become essential in the pursuit of livelihood. Suspension [or revocation] of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases[,] the licenses are not to be taken away without [the] procedural due process required by the Fourteenth Amendment (402 U.S. at 539, citing *Sniadach v. Family Finance. Corp.*, 395 U.S. 337 [1969] and *Goldberg v. Kelly*, 397 U.S. 254 [1970]).

Notably, "[a] hearing held by an administrative tribunal acting in a judicial or quasi-judicial capacity may be more or less informal" and "[t]echnical legal rules of evidence and procedure may be disregarded" (*Matter of Hecht v. Monaghan*, 307 N.Y. 461, 470 [1954]). "Nevertheless, no essential element of a fair trial can be dispensed with unless waived" (*Matter of Hecht v. Monaghan*, 307 N.Y. at 470; *see Matter of McBarnette v. Sobol*, 83 N.Y.2d 333, 339 [1994]; *see*

also *Matter of Scano v. DOCCS Taconic Corr. Facility*, 195 A.D.3d 1325, 1326-1327 [3d Dep't 2021]). “That means, among other things, that the party whose rights are being determined must be fully apprised of the claims of the opposing party and of the evidence to be considered, and must be given the opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal” (*id.*).

“While the constitutional right of confrontation is confined to criminal proceedings” (*see* N.Y. Const., art. I, § 6, U.S. Const. 6th Amend.), courts “have[,] as a matter of due process[,] recognized a limited right to cross-examine adverse witnesses in administrative proceedings” (*Matter of Gordon v. Brown*, 84 N.Y.2d 574, 578 [1994]; *see Matter of McBarnette v. Sobol*, 83 N.Y.2d at 339 [1994]; *Matter of Dowling v. Gardner*, 198 A.D.3d 1056, 1057 [3d Dep't 2021]; *Matter of Alexander M. v. Cleary*, 188 A.D.3d 1471, 1475 [3d Dep't 2020]; *Matter of Weber v. State Univ. of New York Coll. at Cortland*, 150 A.D.3d 1429, 1432 [3d Dep't 2017]; *Matter of Mazzotte v. DiNapoli*, 70 A.D.3d 1233, 1234 [3d Dep't 2010]; *Matter of Kosich v. New York State Dep't of Health*, 49 A.D.3d 980, 983 [3d Dep't 2008]). Further, “the right to cross-examine adverse witnesses” is expressly acknowledged in the DMV’s rules and regulations governing TVB hearings (15 N.Y.C.R.R. § 124.1[b]; 15 N.Y.C.R.R. § 124.4[c]). In this Court’s opinion, permitting police officers to participate and testify in contested traffic violation hearings by telephone, without the motorist’s consent, did not afford motorists even their limited due process right to cross-examination.

Although defendants-respondents made arrangements to have police officers send their tickets, notes and other documentation relevant to an alleged violation to the TVB prior to the hearing, the affirmation and affidavits of attorneys and motorists who appeared before the TVB, submitted in support of the verified complaint-petition, aver to numerous instances in which

officers submitted illegible, insufficient, or incomplete notes and records that could not be verified over the telephone, or testified from notes and “scripts,” which were not produced for review before cross-examination. The supporting affirmations and affidavits further reveal instances in which motorists or their attorneys were unable to present police officers appearing and testifying telephonically with documentary evidence, e.g., photographs and videos among other things, and question the officers about such evidence in an effort to rebut or explain the alleged violations.

Additionally, according to the affirmations and affidavits, there were instances in which a motorist or motorist’s attorney appearing before the TVB was unable to verify and confirm that the police officer testifying by telephone was, in fact, the ticketing officer, and an officer testifying telephonically was, likewise, unable to verify and confirm that the motorist appearing at the hearing was the motorist he or she ticketed with a traffic violation. Furthermore, the affirmations and affidavits disclose instances in which police officers have been heard engaging in other conversations during a TVB hearing or have had other individuals present during their testimony, raising questions as to whether the police officer was being assisted or coached in his or her testimony. Moreover, the affirmations and affidavits make clear that there was no opportunity for the motorist or his or her attorney to observe demeanor and assess credibility when a police officer was testifying by telephone. In nearly every case, despite objections on these various grounds, motorists were found guilty of the ticketed violations, which led to not only the imposition of fines but, in some cases, the suspension of their driver’s licenses.

Under those circumstances, the Court concludes that the motorists’ ability to conduct a cross-examination was adversely impacted, depriving them of a fair hearing. The Court rejects defendants-respondents’ contention that permitting police officers to appear and testify at TVB hearings by telephone “[was] an entirely reasonable measure taken to balance the dueling public

health and safety concerns posed by COVID-19 and continuing the adjudication of traffic violations.”

The Court further finds that the notice provided in this case was constitutionally inadequate. “[P]arties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified” (*Fuentes v. Shevin*, 407 U.S. 67, 80 [1972]). “In the absence of a specific statutory notice provision, the controlling standard [in an administrative context] is procedural due process” (*Matter of 1133 Ave. of Ams. Corp. v. Pub. Serv. Comm’n*, 62 A.D.2d 787, 788 [3d Dep’t 1978]; accord *Matter of Keyspan Energy Servs. Inc. v. Public Serv. Comm’n of State of New York*, 295 A.D.2d 859, 861-862 [3d Dep’t 2002]). Notably, “[f]or notice to be effective, it must inform the affected party of what ‘critical issue’ will be determined at the hearing” (*Nnebe v. Daus*, 931 F.3d 66, 88 [2d Cir. 2019], citing *Turner v. Rogers*, 564 U.S. 431, [2011]). “In addition, ‘part of the function of notice is to give the charged party a chance to marshal the facts in his defense’” (*id.*, quoting *Wolff v. McDonnell*, 418 U.S. 539, 564 [1974][brackets omitted]). Therefore, the notice given must “reasonably . . . convey the required information that would permit [a motorist] to present [his or her] objections” (*Spinelli v. City of New York*, 579 F.3d 160, 172 [2d Cir. 2009][further internal quotation marks and citation omitted]).

The supporting affidavits of three self-represented motorists who appeared before the TVB in August 2020 disclose that they were not notified until they appeared for their TVB hearings that the ticketing police officer would not be present, but would instead be appearing by telephone. The affidavits of these motorists also reveal that they were not informed that notes were provided by the police officers and offered an opportunity to review those notes during their appearances. In all three cases, the motorists aver that their ability to present their defense was adversely affected

by, for example, being unable to present the officer with documentary evidence, to have the officer verify the motorist's identity, or to verify and/or refute information in the officers' notes. While the DMV may notify motorists of the date, time, and location of the hearing and identify the matter to be heard, the notice provided plainly failed "'to insure that they [were] given a meaningful opportunity to present their case'" (*Matter 1133 Ave. of Americas Corp. v. Pub. Serv. Comm'n*, 62 A.D.2d at 788, quoting *Mathews v. Eldridge*, 424 U.S. 319, 348-349 [1976][further internal quotation marks omitted]; accord *Matter of Keyspan Energy Servs. Inc. v. Public Serv. Comm'n of State of New York*, 295 A.D.2d at 861-862), and, therefore, did not comport with due process.

Finally, CPLR § 8601(a) states:

Except as otherwise specifically provided by statute, a court shall award to a prevailing party, other than the [S]tate, fees and other expenses incurred by such party in any civil action brought against the state, unless the court finds that the position of the [S]tate was substantially justified or that special circumstances make an award unjust. Whether the position of the [S]tate was substantially justified shall be determined solely on the basis of the record before the agency or official whose act, acts, or failure to act gave rise to the civil action.

The statute further provides that

[a] party seeking an award of fees and other expenses, shall, within thirty days of final judgment in the action, submit to the court an application which sets forth (1) the facts supporting the claim that the party is a prevailing party and is eligible to receive an award . . . , (2) the amount sought, and (3) an itemized statement from every attorney or expert witness for whom fees or expenses are sought stating the actual time expended and the rate at which such fees and other expenses are claimed (CPLR § 8601[b]).

Should AMVTA wish to proceed with its request for an award of attorneys' fees and costs under the State's EAJA, the Association is directed to make an appropriate application in accordance with CPLR § 8601.

Any remaining arguments not specifically addressed herein have been considered and found to be lacking in merit or need not be reached in light of this determination.

Accordingly, it is hereby

ORDERED AND ADJUDGED, that the portion of the verified complaint-petition seeking Article 78 relief in the nature of mandamus to compel is DENIED for the reasons stated herein; and it is further

ORDERED AND ADJUDGED, that the portion of the verified complaint-petition seeking declaratory relief is GRANTED to the extent that is

ADJUDGED AND DECLARED, that defendants-respondents' policy/practice of permitting police officers to appear and give testimony by telephone in contested traffic violation hearings before the New York State Department of Motor Vehicles, Traffic Violations Bureau, absent the informed consent of the ticketed motorist, violates due process for the reasons stated herein; and it is further

ORDERED, that should AMVTA wish to proceed with its request for an award of attorneys' fees and costs pursuant to New York's EAJA, the Association shall make an appropriate application within thirty (30) days of the date hereof in accordance with CPLR § 8601. Defendants-respondents shall have thirty (30) days from receipt of the same to respond and/or oppose the application.

This memorandum constitutes the Decision and Order/Judgment of the Court. The original Decision and Order/Judgment is being uploaded to the NYSCEF system for filing and entry by the Albany County Clerk. The signing of this Decision and Order/Judgment and uploading to the NYSCEF system shall not constitute filing, entry, service, or notice of entry under CPLR 2220 and § 202.5-b(h)(2) of the Uniform Rules for the New York State Trial Courts. Counsel is not relieved from the applicable provisions of those rules with respect to service and notice of entry of the Decision and Order/Judgment.

SO ORDERED, ADJUDGED, AND DECLARED.**ENTER.**

Dated: December 27, 2021
Albany, New York

HON. KIMBERLY A. O'CONNOR
Acting Supreme Court Justice

Papers Considered:

1. Summons, dated August 27, 2020; Amended Notice of Petition, dated August 31, 2020; Verified Complaint-Petition, dated August 27, 2020; Attorney Affirmation of Michael V. Altholz, Esq., dated August 19, 2020; Affirmation of Michael Elliot Beer, Esq., dated August 18, 2020; Affirmation of Melissa Ann Grippa, Esq., dated August 26, 2020; Attorney Affirmation of John F. Holler, Esq., dated August 19, 2020; Attorney Affirmation of Kimberly Samantha Juszczak, Esq., dated August 25, 2020; Affirmation of West Rappaport, Esq., dated August 25, 2020; General Affidavit of Philip Musico, sworn to August 23, 2020; Affidavit of Miguel Caballero, sworn to August 21, 2020; Affidavit of Lyndon Forde, sworn to August 24, 2020; Affidavit of Johnathan Fu Tom, sworn to August 25, 2020; Affidavit of Jeffrey M. Neckonoff, sworn to August 18, 2020; Hard Copy Exhibit (Flash Drive containing MP3 audio); Transcript of Digitally Recorded Proceeding, dated July 30, 2020;
2. Answer, verified May 27, 2021; Affirmation of Bushra Vahdat, Esq., dated May 27, 2021; Memorandum of Law in Support of Defendants-Respondents' Answer, dated May 27, 2021;
3. Verified Reply of Kimberly Samantha Juszczak, Esq., dated June 1, 2021; Reply Memorandum of Law in Support of Verified Complaint-Petition, dated June 1, 2021;
4. Correspondence from Christopher J. Hummel, Esq., dated June 11, 2021, with unmarked exhibit annexed; *and*
5. Correspondence from Stephen H. Orr, Jr., Esq., dated June 15, 2021.