SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46
----------x

In the Matter of the Application of
NATACHA PRINCE, Index No. 403039/2010

Petitioner

- against - DECISION AND ORDER

DEPARTMENT OF MOTOR VEHICLES,

Respondent

----------x

APPEARANCES:

Petitioner
Natacha Prince, Pro Se

For Respondent
Serwat Farooq, Assistant Attorney General
120 Broadway, New York, NY 10271

LUCY BILLINGS, J.S.C.:

I. THE BASIS FOR THIS PROCEEDING

Petitioner seeks to reverse respondent New York State Department of Motor Vehicle's determination August 31, 2010, affirming the revocation of her driver's license for one year based on her refusal to submit to a chemical test to measure the level of alcohol in her blood, after her arrest for driving under the influence of alcohol. N.Y. Veh. & Traf. Law (VTL) §§ 1192, 1194(2). Although petitioner was acquitted of the charges under VTL § 1192, that acquittal did not eliminate the revocation. VTL §§ 1194(2)(b), 1199(1). See People v. Burnet, 24 Misc. 3d 292, 297 (Sup. Ct. Bronx Co. 2009). The revocation period also now has elapsed, but to reinstate her license she

still must pay the $750 civil penalty respondent assessed as part of its administrative determination on her refusal: a penalty she cannot afford, being unemployed due, at least in part, to the loss of her license. VTL §§ 1194(2)(d)(2), 1199.

Petitioner explains, in sum, that, when the police asked her to submit to the chemical test, she was experiencing an asthma attack, so her primary concern was her request that the police transport her to a hospital to receive emergency treatment, before attending to the test. She maintains that the police never warned her of the potential license revocation if she refused the chemical test.

The verified petition, written by petitioner without legal assistance, specifically complains about the conduct of respondent's administrative hearing on her refusal, the revocation, and the monetary penalty. She points out that, when the police officer witness testified about her arrest and refusal to submit to the test without leading questions from respondent's Administrative Law Judge (ALJ), the officer never mentioned that he or his fellow officer warned her about the consequences of refusing. Only after the ALJ's insistent coaching, to the point of sua sponte identifying and admitting a form reciting the required warning and giving it to the witness to read, did he acknowledge that his fellow officer must have recited that warning to petitioner. Petitioner's appeal form filed with respondent's administrative Appeals Board April 12, 2010, perhaps best summarizes this basis for her appeal:

> Furthermore, the officer at the hearing was not going to testify that he warned me of the consequences of a refusal. He said nothing at all about any warnings until the judge at the hearing coached him to read from a form . . . . Until the judge said "don't you remember saying this," and actually pointed to the part of the form where the refusal language is, the officer was not going to testify to ever warning me. . . . because the officer did not actually warn me of the consequences of a refusal . . . .

V. Answer Ex. A.

As explained more fully below, the court vacates the revocation and civil penalty on a combination of grounds. Due to petitioner's distressed physical and emotional condition, petitioner did not knowingly refuse the chemical test. Although VTL § 1194(2)(a) implies consent to a chemical test, regardless whether consent is unknowing and involuntary, the statutory terms do not similarly imply a refusal if it is unknowing or involuntary. Even if the court is to construe VTL § 1194 to imply a knowing and voluntary refusal regardless of the circumstances, however, respondent failed to satisfy its burden to prove a persistent refusal, which VTL § 1194(2)(f) explicitly requires. Moreover, even if evidence of a persistent refusal was not required in the administrative hearing, the evidence that petitioner's refusal was predicated on a warning of the consequences, presented only through the ALJ's overreaching, was tainted by his readily perceivable bias.

II. THE ADMINISTRATIVE RECORD

While petitioner admits she refused a chemical test at the point when she was experiencing an asthma attack and urgently needed medical treatment, respondent's "REPORT OF REFUSAL"

executed by Police Officer Rogers, who did not testify at the hearing, does not specify that petitioner refused any test. Where the form asks whether the vehicle "operator refused to submit to a . . . BLOOD . . . URINE . . . SALIVA [or] BREATH test," the officer failed to respond. Id.

At the administrative hearing, where arresting officer Anthony testified, he never offered or identified the report of refusal. After Officer Anthony testified about the circumstances surrounding petitioner's arrest, only the ALJ, acting as respondent's advocate, produced the report and identified it in front of the witness, describing it to him: "I show you a report of refusal to submit to a chemical test." Id., Tr. of Proceedings 10, Mar. 18, 2010. The ALJ proceeded, through leading questions, to elicit the witness's affirmation of the criteria authenticating the document and qualifying it as a business record. Satisfied that the report constituted sufficient evidence to support a refusal and warning of the consequences, the ALJ admitted the report in evidence and asked the officer whether he wanted to offer any further testimony.

Returning to the circumstances following petitioner's arrest, Officer Anthony volunteered "that she did explain to me later on that she had a death in the family . . . , that might have contributed . . . to the--the problems she gave us. . . . And after some time she--she was cooperative, and . . . easy to deal with." Id. at 12. Nevertheless, no one attempted a second time to administer a chemical test to her.

Upon examination by petitioner, Officer Anthony further admitted that she was complaining about her asthma. The ALJ quickly interjected with more leading questions, reverting back to the report of refusal, and reminding the witness that it specified the warnings given to petitioner when asked to take a blood test, even though the report did not specify that test. The ALJ asked the witness to read the warnings from the exhibit that the ALJ specified were given to her.

Petitioner, in turn, testified that her father, whom she had been caring for, died November 17, 2009. Late in the evening November 18, 2009, her friend Donna Kelly telephoned petitioner and asked her to drive Kelly home from a bar. Although petitioner preferred not to be bothered in her grief and was crying constantly, she acceded because Kelly had consumed too much alcohol to travel home by herself. Once in petitioner's vehicle, Kelly argued incessantly about where she wanted to be driven, causing petitioner to drive erratically, which led to the police stopping her vehicle. Smelling the alcohol odor emanating from Kelly and the alcohol she had spilled, and observing petitioner's watery, bloodshot eyes, the police arrested petitioner in the early morning of November 19, 2009.

Although petitioner volunteered "to take a sobriety test" when the police stopped her, the officers did not offer a test until later. Id. at 19. By then, petitioner, distraught that she might not be released for her father's funeral the next day,

in pain from handcuffs so tight they were cutting her wrist and numbing her hand, fighting off an asthma attack, and worried she would not receive timely treatment as she waited hours for it, had become too agitated and distracted to concern herself immediately with the test.

Officer Anthony's account was consistent. Petitioner was vomiting, experiencing difficulty breathing, and suffering an asthma attack severe enough that the police secured an ambulance to transport her to a hospital on a stretcher. He "could hardly get her to stand, id. at 8, so she "laid out on the floor." Id. at 9.

Petitioner pointed out that Officer Rogers, who offered the test, never specified the type of test or what it entailed, which might have encouraged petitioner, like warning of the consequences of refusal, to realize she could deal with the test offered despite her distress. People v. Garcia-Cepero, 22 Misc. 3d 490, 497-98 (Sup. Ct. Bronx Co. 2008). Without more detail, petitioner well may have expected that the test would require her to breathe hard into an Intoxilyzer when she "felt her airways tightening up" and was gasping for breath due to her asthma. V. Answer Ex. A. See People v. Bratcher, 165 A.D.2d 906, 907 (3d Dep't 1990); People v. Burnet, 24 Misc. 3d at 296-97. Nor did the officers accommodate her request to loosen her handcuffs to relieve her agitation. Once she refused the test, the officers simply walked away.

III. EVALUATING PETITIONER'S REFUSAL OF A CHEMICAL TEST

A. Whether Petitioner's Refusal Was Knowing and Voluntary

This record supports the conclusion that petitioner's refusal of the test offered by the police, regardless whether the police recited any warning, resulted from her impaired physical and emotional condition, rather than any knowing decision not to submit to a test. Gagliardi v. Department of Motor Vehicles, 144 A.D.2d 882, 883 (3d Dep't 1988). VTL § 1194(2)(a), which obligates a driver, when lawfully arrested on reasonable grounds to believe she was driving while intoxicated, to submit to a chemical test or forfeit her driving privileges, does not require consent to be knowing. People v. Goodell, 79 N.Y.2d 869, 870 (1992); People v. Kates, 53 N.Y.2d 591, 595 (1981); People v. Morrisey, 21 A.D.3d 597, 598 (3d Dep't 2005); People v. Dombrowski-Bove, 300 A.D.2d 1122, 1123 (4th Dep't 2002). See Gagliardi v. Department of Motor Vehicles, 144 A.D.2d at 884. The statute establishes that:

> Any person who operates a motor vehicle in this state shall be deemed to have given his consent to a chemical test . . . , at the direction of a police officer:
>
> > (1) having reasonable grounds to believe such person to have been operating in violation of [VTL § 1192] and within two hours after such person has been placed under arrest for any such violation . . . .

VTL § 1194(2)(a) (emphasis added). Thus a chemical test is valid even when administered to an unconscious, extremely disoriented, or confused person. People v. Goodell, 79 N.Y.2d at 871; People v. Kates, 53 N.Y.2d at 593; People v. Morrisey, 21 A.D.3d at 598; People v. Dombrowski-Bove, 300 A.D.2d at 1123.

VTL § 1194(2)(a)'s plain language does not, however, conclusively establish that a refusal need not be knowing or voluntary. See People v. Morrisey, 21 A.D.3d at 598; Gagliardi v. Department of Motor Vehicles, 144 A.D.2d at 884; People v. Rawley, 16 Misc. 3d 1103, 2007 WL 1775517, at *5 (Sup. Ct. Bronx Co. 2007). While the scant prevailing authority does hold that a refusal need not be knowing to trigger a license forfeiture or to admit the refusal as evidence in the prosecution of a charge under VTL § 1192, in each instance the evidence also showed that the driver was not unconscious, unresponsive, or unaware of the warnings given, or the driver actually consented. People v. Morrisey, 21 A.D.3d at 598-99; Gagliardi v. Department of Motor Vehicles, 144 A.D.2d at 884; People v. Rawley, 16 Misc. 3d 1103, 2007 WL 1775517, at *5.

The rationale for VTL § 1194(2)(a)'s implied consent, moreover, is to avoid a result where the greater a driver's intoxication, the less is her accountability. People v. Kates, 53 N.Y.2d at 595-96; People v. Morrisey, 21 A.D.3d at 599. The evidence here, however, shows that no such result would ensue, because petitioner did not render herself incapable of knowingly and voluntarily refusing or consenting by excessive drinking or injuries sustained from driving after drinking. People v. Garcia-Cepero, 22 Misc. 3d at 494. See People v. Kates, 53 N.Y.2d at 595-96; People v. Morrisey, 21 A.D.3d at 599.

B. Whether Petitioner's Refusal Was Persistent

Even were this court not bound by the Third Department authority that a refusal need not be knowing and voluntary, and were to hold instead that it must be knowing and voluntary, and therefore were to remand to respondent for findings on that issue, further reasons compel a vacatur of the revocation in any event. For evidence of a person's refusal to "be admissible in any trial, proceeding or hearing based upon a violation" of VTL § 1192, VTL § 1194(2)(f) requires a showing not only "that the person was given a sufficient warning, in clear and unequivocal language, of the effect of such refusal," but also "that the person persisted in the refusal." While all refusals of a chemical test to measure the level of alcohol in blood are violations of VTL § 1194, not all arise from a charge of violating VTL § 1192, as petitioner's alleged refusal did. A hearing on a refusal and consequent revocation may be based on a violation of VTL § 1192-a, see VTL § 1194(2)(a) and (b), a traffic infraction, or another non-criminal violation, see VTL § 1194(2)(a)(4), N.Y. Crim. Proc. Law § 1.20(39), N.Y. Penal Law § 10.00(2) and (3); Hahne v. New York State Dept. of Motor Vehs., 63 A.D.3d 936, 937 (2d Dep't 2009), rather than VTL § 1192, on which petitioner's license revocation hearing was based. But for her arrest for violating VTL § 1192, she never would have been subject to a chemical test that she allegedly refused.

Moreover, VTL § 1194(2)(f) refers to "any . . . proceeding or hearing," not just criminal proceedings, and not just

judicial as opposed to administrative hearings. See Hahne v. New York State Dept. of Motor Vehs., 63 A.D.3d at 936-37. Most significantly, the body of appellate authority affirming administrative hearing determinations of a valid refusal hew rigorously to VTL § 1194(2)(f)'s companion requirement for a "warning, in clear and unequivocal language, of the effect of such refusal." See Scaccia v. Martinez, 9 A.D.3d 882, 883 (2d Dep't 2009); Eyrich v. Jackson, 267 A.D.2d 237 (2d Dep't 1999); Galante v. Commissioner of Motor Vehicles of State of N.Y., 253 A.D.2d 763 (2d Dep't 1998); Boyce v. Commissioner of New York State Dept. of Motor Vehicles, 215 A.D.2d 476, 477 (2d Dep't 1995). Nothing in the statute suggests that the second requirement, for a persistent refusal, be any less observed. Dykeman v. Jackson, 262 A.D.2d 877, 878 (3d Dep't 1999).

According to Officer Rogers's report of the refusal and petitioner's emphatic testimony, when Officer Rogers offered the test, he never specified the type of test. Officer Anthony nonetheless testified that Officer Rogers "asked her if she wanted to take a blood test; she refused." V. Answer Ex. A, Tr. at 9. The officers' only other mention of her refusal was her words recited in the report, "No--No I'm not giving nothin'," and the time, 4:05 a.m. Officer Anthony consistently testified that petitioner was otherwise cooperative. Petitioner alluded to her refusal only in explaining her offer to take a sobriety test upon her encounter with the police; the convergent sources of her ensuing distress, agitation, and distraction; and the

police's failure to offer the test initially or after she returned to her calmer, cooperative state.

The record thus lacks substantial evidence that petitioner "persisted in the refusal." VTL § 1194(2)(f); People v. Anderson, __ A.D.3d __, 2011 WL 5220527, at *1 (3d Dep't Nov. 3, 2011); People v. Richburg, 287 A.D.2d 790, 791 (3d Dep't 2001). See People v. Burnet, 24 Misc. 3d at 293. Persistence requires repetitive or unwavering conduct, People v. Anderson, __ A.D.3d __, 2011 WL 5220527, at *1; People v. Richburg, 287 A.D.2d at 791-92; Dykeman v. Jackson, 262 A.D.2d at 878; People v. Bratcher, 165 A.D.2d at 907, a steadfast position, shown by a continued position despite opposition. Dykeman v. Jackson, 262 A.D.2d at 878; People v. Reynolds, 133 A.D.2d 499, 502 (3d Dep't 1987); People v. Garcia-Cepero, 22 Misc. 3d at 494-95; People v. Camagos, 160 Misc. 2d 880, 884-85 (Crim. Ct. Queens Co. 1993). While a driver initially may consent to a chemical test and then definitively refuse when actually administered the test, petitioner affirmatively volunteered to submit to a test, but only later, at her most heightened point of distress and agitation, was she asked to submit to a test. See People v. Burnet, 24 Misc. 3d at 299. The police never countered her response to that one request with any opposition, further explanation of the implications, or encouragement; the police never broached the subject again. People v. Garcia-Cepero, 22 Misc. 3d at 495; People v. Camagos, 160 Misc. 2d at 885. See People v. Garcia-Cepero, 22 Misc. 3d at 497-98. By simply

walking away upon her response, the police prevented any further communication with petitioner and any opportunity for her to repeat, continue, or remain steadfast in refusing the test. People v. Garcia-Cepero, 22 Misc. 3d at 495; People v. Camagos, 160 Misc. 2d at 885.

Moreover, even if a single refusal by itself were enough, petitioner's single refusal was flanked by prior and subsequent consents, which the police ignored. See Hahne v. New York State Dept. of Motor Vehs., 63 A.D.3d at 936-37. While petitioner does not challenge the authority of the person who would administer the test, see VTL § 1194(4); Bazza v. Banscher, 143 A.D.2d 715 (2d Dep't 1988), the lack of specificity regarding the test further undermines any finding that petitioner definitively refused a test to measure her level of alcohol intoxication. Even if Officer Rogers asked her to take a blood test, nothing in the hearing testimony indicates the test's purpose. Only the preprinted portion of his report recites: "the operator was asked to submit to a chemical test to determine the alcoholic and/or drug content of his/her blood." V. Answer Ex. A. This statement is ambiguous whether Officer Rogers actually described the test to petitioner as one "to determine the alcoholic and/or drug content of his/her blood" or whether this phrase simply describes the test contemplated when he asked her only "to submit to a chemical test," id., or "to take a blood test." Id., Tr. at 9. Her response, "I'm not giving nothin'," indicates no understanding of either the type

or the purpose of any requested test. People v. Garcia-Cepero, 22 Misc. 3d at 495.

The requirement for a persistent refusal recognizes that the refusal to submit to a chemical test evinces the driver's "consciousness of guilt" that the alcohol content of her blood is high. People v. Anderson, __ A.D.3d __, 2011 WL 5220527, at *1; People v. Beyer, 21 A.D.3d 592, 595 (3d Dep't 2005); People v. Gallup, 302 A.D.2d 681, 683 (3d Dep't 2003); Bazza v. Banscher, 143 A.D.2d at 716. Here, of course, the benefit of hindsight establishes that petitioner bore no guilt to be conscious of. Yet even without hindsight, in the revocation hearing, in contrast to the trial on guilt under VTL § 1192 or a trial on liability for personal injury or property damage due driving while intoxicated, Bazza v. Banscher, 143 A.D.2d 715, her culpability of that act, evidenced by her consciousness of culpability, is not an issue. Therefore she had no reason or occasion to show that the circumstances of her refusal did not evince her culpability of driving while intoxicated. See People v. Burnet, 24 Misc. 3d at 300. Without that opportunity, as is afforded in the trial on the criminal charges or on liability for damages, evidence of a persistent refusal is all the more important: too important for the evidence of persistence to be so lacking here.

IV. THE CONDUCT OF THE HEARING ALSO DEPRIVED THE RECORD OF SUBSTANTIAL EVIDENCE THAT ANY REFUSAL WAS PREDICATED ON A WARNING.

Again hindsight's clairvoyance shows petitioner would have benefited from submitting to a test to establish that she was not in fact under the influence of alcohol, as her trial on the criminal charges eventually showed. People v. Garcia-Cepero, 22 Misc. 3d at 495. Conscious of her innocence, petitioner had no incentive to refuse such a test, with its positive consequences, if she were aware of her refusal's adverse consequences. As she succinctly affirmed in her appeal to respondent's Appeals Board: "If I had known there were consequences, I would have taken the test." V. Answer Ex. A.

Of course the ALJ at the hearing did not know the eventual verdict of innocence, but given that distinct possibility, he was obligated to accept the concomitant possibility that she was never warned of her refusal's adverse consequences equally with the possibility that she was so warned. His conduct of the hearing demonstrates his ready assumption that she was warned and closedmindedness to any other set of facts. His affirmative assistance and advocacy on the police's behalf and lack of evenhandedness toward petitioner's presentation taints what evidence of a warning the record contains. C.P.L.R. § 7803(3) and (4); Hakeem v. Coombe, 233 A.D.2d 805, 806 (3d Dep't 1996).

Respondent agency offered no evidence that petitioner's refusal was predicated on a warning of the consequences until the ALJ offered it and developed it through his pointed questioning of respondent's witness. Although the burden to produce that evidence rested on respondent, the ALJ's conduct

effectively shifted that burden to petitioner, unschooled in the issues to be explored in the hearing, to produce evidence and prove that she was not warned. C.P.L.R. § 7803(3); Earl v. Turner, 303 A.D.2d 282, 283 (1st Dep't 2003); Feliz v. Wing, 285 A.D.2d 426, 427 (1st Dep't 2001); Wheels, Inc. v. Parking Violations Bur. of Dept. of Transp. of City of N.Y., 185 A.D.2d 110, 111 (1st Dep't 1992). See People v. Anderson, __ A.D.3d __, 2011 WL 5220527, at *1; Casalino Interior Demolition Corp. v. Martinez, 29 A.D.3d 691, 692 (2d Dep't 2006).

This biased conduct of the hearing exhibited by the transcript further prejudiced petitioner's rights, 1616 Second Ave. Rest. v. New York State Liq. Auth., 75 N.Y.2d 156, 161-62 (1990); Artists & Craftsmen Bldrs. v. Shapiro, 232 A.D.2d 265, 266 (1st Dep't 1996), and violated due process. Earl v. Turner, 303 A.D.2d 282; Feliz v. Wing, 285 A.D.2d at 427. See Barnes v. Washington Mut. Bank, FA, 40 A.D.3d 357, 358 (1st Dep't 2007); Scaccia v. Martinez, 9 A.D.3d at 884. Whether or not the ALJ actually held a preconceived view of the proved material facts at the hearing, 1616 Second Ave. Rest. v. New York State Liq. Auth., 75 N.Y.2d at 161, the portions of the transcript referred to above "nonetheless gave . . . that impression." Id. at 164. A disinterested reader of those portions of the transcript could well regard them as evidencing the ALJ's belief that one of the officers with petitioner after her arrest undoubtedly must have warned her of the consequences of refusing a test to determine her intoxication, even if unproved by the witnesses themselves.

The reader could well conclude that the ALJ "in some measure adjudged the facts . . . of a particular case in advance of hearing" the proved facts. Id. at 162. See Gatto v. Adduci, 182 A.D.2d 760, 761 (2d Dep't 1992). The ALJ's assumptions, assistance, and advocacy on the police's behalf and his lack of openmindedness and evenhandedness toward petitioner's version of the facts leave no impression of his ever entertaining any likelihood that the officers failed to warn her or that a finding of a warning was unfounded. Instead, the biased impression he gave "lent an impermissible air of unfairness to the proceeding." 1616 Second Ave. Rest. v. New York State Liq. Auth., 75 N.Y.2d at 164.

An "impartial decision maker is a core guarantee of due process, fully applicable to adjudicatory proceedings before administrative agencies . . . ." Id. at 161. The ALJ's demonstrated bias, in violation of due process, by itself also provides a basis for vacating his decision. C.P.L.R. § 7803(3). See Scaccia v. Martinez, 9 A.D.3d at 884.

The ALJ's affirmative assistance and advocacy on the police's behalf without at least equal treatment of petitioner and her potential defenses worked a particular deprivation of fairness and due process because, if the ALJ was obligated to develop the evidence on behalf of any party, that party was the unrepresented individual petitioner. Jackson v. Hernandez, 63 A.D.3d 64, 69 (1st Dep't 2009); Feliz v. Wing, 285 A.D.2d at 427. Yet the tainted evidence of a warning teased out of

respondent's lone witness relieved respondent of its burden, when otherwise, had the ALJ simply allowed the evidence to develop, petitioner would have been relieved of any burden to rebut and would have had no need even for development of the evidence on her behalf. C.P.L.R. § 7803(3); 72A Realty Assoc. v. New York City Envtl. Control Bd., 275 A.D.2d 284, 286 (1st Dep't 2000); Wheels, Inc. v. Parking Violations Bur. of Dept. of Transp. of City of N.Y., 185 A.D.2d at 111; Hakeem v. Coombe, 233 A.D.2d at 806. Having extended himself to respondent, the ALJ hardly could retract to allow petitioner's testimony to prevail over Officer Anthony's coached albeit tentative testimony, even had the ALJ assisted petitioner to develop her evidence. The strength of her defense, after all, lay in the absence of evidence supporting respondent's action.

These circumstances independently support reversing the revocation, rather than remanding to respondent agency, even to a different ALJ, for development of a new record. Earl v. Turner, 303 A.D.2d at 283; Wheels, Inc. v. Parking Violations Bur. of Dept. of Transp. of City of N.Y., 185 A.D.2d 110; Casalino Interior Demolition Corp. v. Martinez, 29 A.D.3d at 691-92; Hakeem v. Coombe, 233 A.D.2d at 806. First, a remand would not undo the coaching of respondent's witness. Moreover, to whatever extent a remand achieves its purpose in developing the evidence on petitioner's behalf, thus diminishing any residual evidence of a warning, the result will further weaken the evidence of a persistent refusal--the less the evidence of a

definite warning or its reinforcement through repetition, the less the evidence of a definitive, deliberate, or steadfast refusal. VTL § 1194(2)(f); People v. Bratcher, 165 A.D.2d at 907; People v. Reynolds, 133 A.D.2d at 502; People v. Garcia-Cepero, 22 Misc. 3d at 494-95; People v. Camagos, 160 Misc. 2d at 884-85.

Yet, even if the Second Department's suggestion that substantial evidence of petitioner's persistent refusal is not required in administrative hearings under VTL § 1194, Hahne v. New York State Dept. of Motor Vehs., 63 A.D.3d at 936-37, controls over the Third Department's prior recognition that § 1194(2)(f) does require that evidence in those hearings, Dykeman v. Jackson, 262 A.D.2d at 878, the ALJ's prejudgment of the facts and partiality in conducting the hearing tip the balance. See Scaccia v. Martinez, 9 A.D.3d at 884; Gatto v. Adduci, 182 A.D.2d at 761. The ALJ's conduct already has impaired respondent's evidence of a warning. The remedy for that conduct, upon a remand, would be a development of the evidence in petitioner's favor. If the footing for respondent's determination already is failing, and a remand would undermine that footing only further, there is no reason not to reverse the revocation based on the current record.

V. DISPOSITION

For the combined reasons set forth, the court vacates respondent's determination August 31, 2010, revoking petitioner's driver's license and assessing a civil penalty.

C.P.L.R. §§ 7803(3) and (4), 7806; VTL §§ 1194(2), 1199. Absent any impediments to reinstatement of petitioner's license unassociated with her arrest and refusal to submit to a chemical test November 19, 2009, respondent shall reinstate her license immediately. This decision constitutes the court's order and judgment granting the petition to the above extent. C.P.L.R. § 7806. The court will mail copies to petitioner and to respondent's attorney.

DATED: November 30, 2011

_____

LUCY BILLINGS, J.S.C.