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**Due Process, Supreme Court, Appellate Division Third
Department: Loyal Tire and Auto Center v. New York State
Thruway**

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SUPREME COURT, APPELLATE DIVISION

THIRD DEPARTMENT

Loyal Tire and Auto Center

v.

New York State Thruway¹⁸⁸
(decided January 16, 1997)

Plaintiff, Loyal Tire and Auto Center, a garage and towing center, was issued a letter of authorization by defendant, the New York State Thruway Authority allowing plaintiff to enter into specified areas of the thruway to remove disabled or abandoned vehicles.¹⁸⁹ The letter contained certain restrictions which preserved defendant's right to: (1) revoke such authorization without prior notice, (2) reevaluate plaintiff's performance prior to renewal of authorization, and (3) to reach findings regarding customer complaints that were final and could result in termination.¹⁹⁰ Plaintiff's letter of authorization was terminated following an incident in which plaintiff's tow truck significantly damaged a tractor trailer while towing it and plaintiff thereafter refused to pay for the damages.¹⁹¹

Plaintiff initiated an Article 78 proceeding¹⁹² seeking to set aside the determination by defendant to revoke plaintiff's letter of authorization,¹⁹³ alleging that the determination was made in

¹⁸⁸ 227 A.D.2d 82, 652 N.Y.S.2d 804 (3d Dep't), *lv. to appeal denied*, 90 N.Y.2d 804, 684 N.E.2d 281, 661 N.Y.S.2d 831 (1997).

¹⁸⁹ *Id.* at 83, 652 N.Y.S.2d at 805.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 84, 652 N.Y.S.2d at 806.

¹⁹² N.Y. C.P.L.R. 7801 (McKinney 1997). An Article 78 proceeding is authorized pursuant to the following provision: "Relief previously obtained by writs of certiorari to review, mandamus or prohibition shall be obtained in a proceeding under this article." *Id.*

¹⁹³ *Loyal Tire*, 227 A.D.2d at 84, 652 N.Y.S.2d at 806; N.Y. C.P.L.R. 7803(3) (McKinney 1997). This section permits a court to decide "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion,

violation of his due process right¹⁹⁴ to a hearing before authorization is terminated.¹⁹⁵ Defendant cross moved to dismiss the petition as moot because plaintiff's letter of authorization had expired prior to the termination order.¹⁹⁶ The trial court held for plaintiff, finding that defendant violated plaintiff's due process rights by failing to provide plaintiff with notice and an opportunity to be heard prior to revoking the authorization letter as required by the State Administrative Procedure Act, article 3, § 301.¹⁹⁷ Therefore, defendant's determination was annulled and the matter was remitted to defendant for a new determination.¹⁹⁸

Defendant appealed challenging the trial court's finding, arguing that the State Administrative Procedure Act § 301 requires a hearing only if required by a separate state law, and absent such statutory authority, the Act is not applicable.¹⁹⁹ The Appellate Division, Third Department affirmed,²⁰⁰ holding that in order to invoke the protections of the Due Process Clause of the Fourteenth Amendment, a party must have a property interest "created not by the N.Y. Constitution, but rather 'by existing rules or understandings that stem from an independent source such as state law.'"²⁰¹ Furthermore, since defendant, a New York State agency, retains significant discretion over the

including abuse of discretion as to the measure or mode of penalty or discipline imposed." *Id.*

¹⁹⁴ U.S. CONST. amend XIV. The Due Process Clause of the 14th Amendment provides: "No state shall enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law." *Id.*

¹⁹⁵ *Loyal Tire and Auto Center v. New York State Thruway Authority*, 168 Misc. 2d 110, 111, 645 N.Y.S.2d 696, 697 (Sup. Ct. Orange County 1995).

¹⁹⁶ *Loyal Tire*, 227 A.D.2d at 84, 652 N.Y.S.2d at 806.

¹⁹⁷ *Id.*; N.Y. A.P.A. § 301 (McKinney 1997). This section of the State Administrative Procedure Act provides: "all parties shall be afforded an opportunity for hearing within reasonable time" *Id.*

¹⁹⁸ *Loyal Tire*, 227 A.D.2d at 84, 652 N.Y.S.2d at 806.

¹⁹⁹ *Id.* at 84-85, 652 N.Y.S.2d at 806-07.

²⁰⁰ *Id.* at 85, 652 N.Y.S.2d at 806.

²⁰¹ *Id.* (quoting *Medicon Diagnostic Labs v. Perales*, 74 N.Y.2d 539, 545, 549 N.E.2d 124, 127 (1989)).

plaintiff's continued participation in the government program, a property interest does not accrue.²⁰² Thus, plaintiff's authorization letter was subject to the agency's rules and regulations and, by accepting it, plaintiff also accepted its terms.²⁰³

Plaintiff was called to tow a tractor trailer that had overturned on the New York State Thruway.²⁰⁴ Subsequently, the owner of the trailer complained that the plaintiff's tow truck driver had dropped the trailer on the roadway causing significant damage.²⁰⁵ After an investigation of the incident, defendant requested that plaintiff refund the owner for the damage.²⁰⁶ When plaintiff refused to comply, defendant's Assistant Traffic Supervisor issued plaintiff a letter of deficiency.²⁰⁷ Thereafter, the New York State Thruway Authority Traffic and Safety Committee reviewed the matter and issued a letter directing the plaintiff to pay the owner or appeal in a timely manner.²⁰⁸ Plaintiff appealed and the Committee terminated Plaintiff's letter of authorization.²⁰⁹ Plaintiff then attempted to regain its authorization by offering to pay the owner.²¹⁰ However, defendant rejected plaintiff's offer.²¹¹ Plaintiff then paid the owner directly, and initiated this Article 78 proceeding to set aside defendant's revocation of Plaintiff's letter of authorization.²¹²

In rejecting defendant's claims, the Court of Appeals relied on *Matter of Niagara Mohawk Corp. v. New York State Dep't of Transportation*²¹³ in emphasizing that in order to invoke the Due Process Clause, a party must have a property interest in a

²⁰² *Id.* (citing *Top Lube v. Erie County Dep't of Health*, 214 A.D.2d 974, 975, 626 N.Y.S.2d 628, 629 (4th Dep't 1995)).

²⁰³ *Id.*

²⁰⁴ *Id.* at 84, 652 N.Y.S.2d at 805.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 84, 652 N.Y.S.2d at 805-06.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ 224 A.D.2d 767, 637 N.Y.S.2d 505 (3d Dep't 1996).

government benefit.²¹⁴ In *Niagara Mohawk*, an electric and gas utility instituted an Article 78 proceeding against the Department of Transportation for promulgating a new regulation which would change the fee system for permits to erect pipelines across the New York State Canal System.²¹⁵ The flat annual fee was changed to a fee equivalent to a percentage of the occupied property's fair market value, causing significant increased costs to plaintiff.²¹⁶ Plaintiff argued that the regulation violated the utility company's due process rights by depriving plaintiff of its property interest in canal crossing rights and unnecessarily burdened its ratepayers by causing plaintiff to raise its utility rates.²¹⁷ The *Niagara Mohawk* court rejected plaintiff's claims, holding that when a statute authorizes a government agency in its discretion to issue revocable permits granting certain limited privileges upon such terms and conditions as they prescribe, rarely will a recipient be able to establish a property interest.²¹⁸ Therefore, the electric and gas utility cannot claim that its Due Process rights have been violated.²¹⁹ Similarly, *Loyal Tire* did not have a property interest in its right to tow and repair vehicles, since it was subject to, and accepted, the defendant's rules and regulations.²²⁰

In *Medicon Diagnostic Labs v. Perales*,²²¹ a medical laboratory brought suit against Medicaid challenging the constitutionality of a regulation which authorizes the withholding of payment of reimbursement claims without prior notice or a meaningful opportunity to be heard.²²² In response to a marked increase in Medicaid billings, the agency administering the program withheld payment while they investigated the billing practices of some 40

²¹⁴ *Loyal Tire*, 227 A.D.2d at 82, 652 N.Y.S.2d at 806.

²¹⁵ *Niagara Mohawk*, 224 A.D.2d at 767-68, 637 N.Y.S.2d at 507.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.* at 768, 637 N.Y.S.2d at 508.

²²⁰ *Loyal Tire & Auto Center v. New York State Thruway*, 227 A.D.2d 82, 86, 652 N.Y.S.2d, 804, 807 (3d Dep't 1997).

²²¹ 74 N.Y.2d 539, 549 N.E.2d 124, 549 N.Y.S.2d 933.

²²² *Id.* at 541-43, 549 N.E.2d 125-27, 549 N.Y.S.2d at 934-36.

laboratories.²²³ The regulation provided for safeguarding the expenditure of public funds until the claims could be verified.²²⁴ Plaintiff argued that such action constituted a seizure on its property in violation of its right to due process.²²⁵

On appeal, the court rejected plaintiff's due process claims.²²⁶ Citing to the United States Supreme Court, the *Medicon Diagnostic Labs* court noted that the "range of interests protected by procedural due process is not infinite."²²⁷ By enrolling in the medical assistance program, the provider agreed to abide by the agency's regulations and to submit to permit audits and claim review.²²⁸ Also, where there was reliable information that a provider was involved in fraud or unacceptable practices,

²²³ *Id.* at 542, 549 N.E.2d at 125, 549 N.Y.S.2d at 934.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.* at 545, 549 N.E.2d at 127, 549 N.Y.S.2d at 936.

²²⁷ *Id.* (citing *Board of Regents v. Roth*, 408 U.S. 564 (1971)). *Medicon Diagnostic Labs* additionally noted that "due process is a flexible constitutional concept calling for procedural protections as a situation may demand." *Id.* at 546, 549 N.E.2d at 128, 549 N.Y.S.2d at 937. In determining whether due process standards have been satisfied, a court should balance three distinct factors:

First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Id. (quoting *Morgenthau v. Citisource, Inc.*, 68 N.Y.2d 211, 221, 500 N.E.2d 850, 855, 508 N.Y.S.2d 152, 157 (1986) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976))). In applying the *Mathews* test, the Court held that regulations permitting the withholding of payment on Medicaid claims did adequately safeguard the plaintiff's due process rights since they require reliable information that the provider was involved in fraud or abused the program before payments are withheld. *Id.* at 547, 549 N.E.2d at 128, 549 N.Y.S.2d at 937. In addition, prompt notice and reasons for the withholding were required. *Id.*

²²⁸ *Medicon*, 74 N.Y.2d at 546, 549 N.E.2d at 127-28, 549 N.Y.S.2d at 936-37.

regulations authorized withholding of reimbursement without prior notice or an opportunity to be heard.²²⁹

In addition, *Loyal Tire* and *Medicon* both relied on the federal due process analysis in *Cleveland Bd. of Educ. v. Loudermill*,²³⁰ which held that property interests are not created by the Constitution, but rather “by existing rules or understandings that stem from an independent source such as state law.”²³¹ Consequently, *Loyal Tire* held that since the defendant, the New York State Thruway Authority, had not promulgated rules or regulations that require determinations by defendant be made on the record or after a hearing, plaintiff did not have a property interest and was not deprived of a due process right.²³²

Finally, the court held, when an agency retains “significant discretion” over an individual’s participation in a government program, a property interest does not accrue.²³³ Defendant, pursuant to Public Authorities Law § 354²³⁴ and 359,²³⁵ has complete discretion as to how it will function and may decide what regulations to promulgate.²³⁶ When plaintiff agreed to

²²⁹ *Id.* at 546, 549 N.E.2d at 128, 549 N.Y.S.2d at 937.

²³⁰ *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532 (1985).

²³¹ *Loyal Tire & Auto Center v. New York State Thruway*, 227 A.D.2d 82, 86, 652 N.Y.S.2d 804, 806-07 (3d Dep’t 1997) (citing *Medicon*, 74 N.Y.2d at 545, 549 N.E.2d at 127, 549 N.Y.S.2d at 936 (quoting *Loudermill*, 470 U.S. at 538)).

²³² *Loyal Tire*, 227 A.D.2d at 85, 652 N.Y.S.2d at 806.

²³³ *Id.* (citing *Top Lube v. Erie County Dep’t of Health*, 214 A.D.2d 974, 975, 626 N.Y.S.2d 628, 629 (4th Dep’t 1995)). In *Top Lube*, the court held that the plaintiff was not entitled to a hearing to renew his vendor contract where federal and state regulations specify that the agency has no obligation to renew such contract. *Id.* In addition, there is no requirement for a fair hearing after the performance period has expired. *Id.*

²³⁴ N.Y. PUB. AUTH. LAW § 354 (McKinney 1997). This provision empowers the New York State Thruway Authority to: “[d]o all things necessary or convenient to carry out its purposes and exercise the powers expressly given in this title.” *Id.*

²³⁵ N.Y. PUB. AUTH. LAW § 359 (McKinney 1997). Section 359 provides that: “the authority shall proceed with the construction, reconstruction or improvement [of a thruway]. . . pursuant to a contract . . . and upon such terms and conditions as the authority shall require . . .” *Id.*

²³⁶ *Loyal Tire*, 227 A.D.2d at 85, 652 N.Y.S.2d at 806.

accept defendant's letter of authorization, permitting it to tow trucks from the Thruway, it also accepted the defendant's terms,²³⁷ including the defendant's right to revoke authorization without prior notice.²³⁸

The federal and state law both accord governmental agencies great discretion and authority in promulgating rules and procedures relating to government contracts or programs. In order to succeed on a due process claim, the plaintiff must demonstrate that he has a property interest.²³⁹ Such property interest is derived not from the Federal or State Constitutions, but from an independent source such as state law or other authority.²⁴⁰ However, when an agency retains significant discretion over participation in a government program, the plaintiff will be subject to the terms of the contract it signed with the government agency.²⁴¹

SUPREME COURT

GENESSEE COUNTY

Daniel S. v. Dowling²⁴²
(decided April 28, 1997)

In February 1994, petitioner Daniel S., a ten year old boy was allegedly abused by his father, who was separated from his mother.²⁴³ The Statewide Central Register of Child Abuse and Maltreatment [hereinafter "SCR"] was notified and an investigation was made according to the regulatory procedures.²⁴⁴ This action was filed on Daniel's behalf, pursuant to Article 78 of

²³⁷ *Id.* at 86, 652 N.Y.S.2d at 807.

²³⁸ *Id.* at 83, 652 N.Y.S.2d at 805.

²³⁹ *Loyal Tire*, at 82, 652 N.Y.S.2d at 806.

²⁴⁰ *Loyal Tire*, at 86, 652 N.Y.S.2d 804, 806-07.

²⁴¹ *Id.*

⁴¹⁰ 172 Misc. 2d 619, 660 N.Y.S.2d 288 (Sup. Ct. Genessee County 1997).

²⁴³ *Id.* at 620, 660 N.Y.S.2d at 290.

²⁴⁴ *Id.*