

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

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

Petitioner,

**DECISION, ORDER and
JUDGMENT**

Index No.: 2643-17

RJI No.: 01-17-ST8693

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

-against-

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

Respondent(s).

(Supreme Court, Albany County, Article 78 Term)

APPEARANCES:

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Renika Moore, Assistant Attorney General, Chief of Labor Bureau
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HON. W. BROOKS DeBOW, Acting Justice:

This proceeding pursuant to CPLR article 78 seeks review of a resolution and decision by
respondent New York State Industrial Board of Appeals (IBA or "the Board") after a hearing on a

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stipulated record to invalidate certain regulations promulgated by petitioner Commissioner of Labor, which established rules for, among other things, payment of employees' wages by payroll debit cards. The administrative challenge was brought by respondent Global Cash Card, Inc., an out-of-state entity that has contracts with numerous New York employers to provide payroll debit cards and associated services to their employees. In this proceeding, petitioner Commissioner seeks review of respondent IBA's determination on several grounds, including that respondent IBA improperly decided that respondent Global Cash Card had standing to challenge the regulations before the Board, that the respondent IBA's determination was contrary to law, and that respondent IBA's invalidation of the entirety of the regulation at issue was arbitrary and capricious.

Respondent Global Cash Card has moved by Order to Show Cause and prior to answering the petition to strike certain documents and parts of petitioner's memorandum of law on the ground that the documents are de hors the administrative record, which motion is opposed by petitioner and which respondent IBA declines to oppose. By a prior order of this Court, further proceedings were held in abeyance pending the filing of respondents' answers as well as submissions on the threshold issue of Global Cash Card's standing. The matter is now ready for full consideration.

On September 7, 2016, petitioner adopted regulations codified at 12 NYCRR part 192 that address payment of wages (see Verified Petition, Exhibit A), and which include provisions addressed to payment of wages by payroll debit card (see 12 NYCRR 192-2.3).¹ Respondent Global Cash Card brought a petition before respondent IBA in which it "[s]pecifically . . . challenge[d] the

¹ Payroll debit cards are pre-paid, reloadable cards that can be used to make purchases and to obtain cash. They are described as "a substitute for issuing a paper check to an employee who is not being paid via direct deposit into a checking or savings account" (Kerwin Affirmation, Exhibit B, Sub-exhibit B [Discussion Paper], at p. 3).

validity and reasonableness of the portions of the Regulations governing payment of wages by ‘payroll debit card’ ” (Kerwin Affirmation, Exhibit B, ¶ 1). Of paramount concern to respondent Global Cash Card are the regulatory provisions that address the locations of automated teller machines (ATMs) and prohibit charging employees certain fees associated with their use of ATMs to access their wages (see id., Exhibit B, ¶¶ 5, 29, 32; see also 12 NYCRR § 192-2.3 [b] [1]; [2]). The administrative petition challenged the Commissioner’s adoption of the regulations as an usurpation of legislative policy-making authority, as preempted by federal law, and as unreasonable (see Kerwin Affirmation, Exhibit B, ¶¶ 7-9). The Commissioner answered the administrative petition and asserted a number of affirmative defenses addressed to the merits of the matter, and also asserted that Global Cash Card lacked standing to challenge the Part 192 regulations in the administrative proceeding (see id., Exhibit C, ¶¶ 24-29). The matter proceeded on a stipulated record (see id., ¶ 1; Exhibit A), oral argument before respondent IBA was had (see id., ¶ 4; Exhibit D), and post-hearing materials were submitted (see Morgen Affirmation, Exhibit A). Respondent IBA issued a Resolution of Decision in which it preliminarily determined that Global Cash Card had statutory standing to challenge the Commissioner’s adoption of the regulations:

“Petitioner has standing in this proceeding as an “interested person” because the regulations govern the conduct of petitioner inasmuch as it is an ‘agent’ of employers it has contracted with to issue payroll debit cards to employees in New York (see Labor Law § 101 [1] [any person in interest may petition the Board for review of the validity or reasonableness of any regulation made by the Commissioner of Labor under the Labor Law]).”

(see Kerwin Affirmation, Exhibit E, at p.5 [Captioned “Standing Under Labor Law § 101”]). Respondent IBA declared invalid and revoked the entirety of 12 NYCRR part 192 on the ground that the Commissioner had exceeded the authority delegated to her by the Legislature because the restrictions on payroll debit cards extended beyond her competence and expertise in the area of employment relationships and encroached upon the jurisdiction of banking and financial services regulators (see *id.*, Exhibit E, at pp. 10-13). The decision of respondent IBA recited unsuccessful legislative attempts to enact laws addressing the use of payroll debit cards in support of its conclusion that “the regulations exceed [the Commissioner’s] authority and are beyond the scope of the [Labor Law] statute” (*id.*, at p.11). The decision did not address whether the Commissioner’s actions had impermissibly violated the doctrine of separation of powers as between the legislative and administrative branches, nor did it address the arguments of Global Cash Card that several specific provisions in Part 192 were unreasonable.

Turning first to the issue of Global Cash Card’s standing in the administrative proceeding, Labor Law § 101 (1) provides that “any person in interest or his duly authorized agent may petition the board for a review of the validity or reasonableness of any rule, regulation or order made by the commissioner under the provisions of” the Labor Law “[e]xcept where otherwise prescribed by law” (Labor Law § 101 [1]). Petitioner’s arguments against Global Cash Card’s standing in the administrative proceeding – that it does not meet the common law “zone of interest” and “injury in fact” analysis, and that it is not an “agent” of employers – do not provide a persuasive basis upon which to reject the IBA’s standing determination. Petitioner’s arguments overlook the distinction between standing to appear in an administrative proceeding and standing to seek judicial review of

an administrative proceeding.

Administrative standing in this matter is broadly defined by Labor Law § 101 (1) and it is up to the administrative entity -- here, respondent IBA -- to determine whether an individual or entity falls within the statutory limit of who may seek administrative review. In such a situation and upon judicial review of the administrative determination, "the construction given statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld" (Matter of Howard v Wyman, 28 NY2d 434, 438 [1971]; see Matter of Sigety v Ingraham, 29 NY2d 110, 114 [1971] [administrative determination "arrived at by a broad application of specific statutory terms is not to be disturbed if it has a reasonable basis and is not arbitrary or capricious"]; see also Matter of Wells Plaza Corp. (Industrial Commr. of State of N.Y. -- New York Hotel Trades Council, AFL-CIO), 10 AD2d 209, 213-214 [3d Dept 1960], affd 8 NY2d 975 [1960] [judicial deference given to IBA's determination as to whether an entity has standing to participate in the administrative proceeding]).

In comparison, a party seeking judicial review of a determination reached after an administrative process in which the party did not participate must demonstrate an injury in fact that must "fall within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the agency has acted" (New York State Assn. of Nurse Anesthetists v Novello, 2 NY3d 207, 211 [2004]). In other words, when a person or entity that did not have party status in the administrative proceeding seeks judicial review of the administrative determination, the courts must determine, as a threshold matter, whether that person or entity has suffered an injury in fact within the zone of interests addressed by the statute to ensure that the court is adjudicating a

justiciable controversy as compared to simply issuing an advisory opinion (see Society of Plastics Indust. v County of Suffolk, 77 NY2d 761, 769 [1991]; Matter of Dairylea Coop. v Walkley, 38 NY2d 6, 9 [1975]).

In the instant matter, the issue presented is whether respondent IBA correctly determined that Global Cash Card had standing to participate as a party in the administrative proceeding. Insisting that Global Cash Card essentially concedes that it does not satisfy the zone of interests tests, petitioner asserts that respondent IBA created a new and expansive test of standing that is neither warranted nor workable (see Petitioner's Reply Memorandum of Law, at pp. 7-9), without acknowledging the difference between standing to participate in administrative proceedings as compared with standing to seek judicial review of the administrative proceedings, as discussed in Matter of Howard v Wyman and Matter of Sigety v Ingraham, as set forth above.

The record in this matter reflects that Global Cash Card has an interest in the regulations addressing payment by payroll debit card because, with the exception of obtaining employees' initial consent to be paid by payroll debit card, Global Cash Card fully administers employees' participation in the payroll debit card system (see Morgen Affirmation, Exhibit A [Purcell Affidavit], ¶¶ 8-17). As such, Global Cash Card operates as an agent of the employers, which the Commissioner acknowledged in responses to comments on the proposed regulations (see e.g., Kerwin Affirmation, Exhibit C, Sub-exhibit [response to comment 15]). A consent form template issued by the Commissioner expressly states that the prohibition on fees associated with a payroll debit card applies to a payroll card issuer, such as Global Cash Card (see Supplemental Purcell Affidavit, ¶¶ 22-23; Exhibit A). It is clear that Global Cash Card has an interest in that part of the Part 192

regulations that address payroll debit cards because it is an entity that would be financially affected by the rules governing ATM access and fees, either directly (by absorbing costs that would be covered by fees) or indirectly (by losing the business of employers who decline to pay the associated fees charged by Global Cash Card). Inasmuch as the IBA's determination that Global Cash Card was a "person in interest" within the meaning of Labor Law § 101 (1) finds support in the record and is not arbitrary or capricious, its determination on the issue of Global Cash Card's standing to petition the IBA will not be disturbed.

A second preliminary issue is presented by respondent Global Cash Card in the form of a motion to "correct the pleadings and record" by striking an affidavit and affirmation submitted by petitioner in this Article 78 proceeding along with as references thereto in petitioner's memorandum of law. In its decision, respondent IBA recognized that "Labor Law § 199 provides that '[t]he commissioner may issue such rules and regulations as he determines necessary for the purpose of carrying out the provisions of [Article 6]' " (Petition, Exhibit B, at p.5). Notwithstanding respondent IBA's acknowledgment of this broad statutory grant of authority, its revocation of Part 192 of NYCRR Title 12 was based upon its finding that petitioner had overreached her authority by intruding into the regulation of banking. Respondent IBA's decision quoted certain apparently persuasive passages from the voluminous administrative record, including in relevant part the following public comments submitted during the rule-making process:

"We [Senators Martins and Murphy] are concerned that the Department [of Labor] has overstepped its statutory authority . . . [and] we recommend the Department to seek advice of the Department of Financial Services"

(id., at p. 6-7), as well as from Assembly Members Robinson, Titus, and Zebrowski, who stated that:

“We urge [the Department of Labor] to consult with the Department of Financial Services to ensure that its rules do not duplicate or conflict with banking regulations”

(id., at p. 8). These quoted comments were reiterated in respondent IBA’s discussion of the scope of petitioner’s regulatory authority (see id., at p. 11), and respondent IBA’s primary basis for revoking Part 192 was that “these regulations go beyond regulation of the employment relationship and into the area of banking law” (id.). Clearly, respondent IBA’s determination was based in part on its view that petitioner had not consulted with the Department of Financial Services (DFS) during the development of the regulations.

Respondent Global Cash Card seeks to strike the affirmation of a supervising counsel from DFS and the affidavit of General Counsel of the Department of Labor (DOL) and the discussion of them in petitioner’s memorandum of law, which were submitted to this Court on the Article 78 petition but which were not before respondent IBA during the administrative process. These materials seek to correct an alleged error of fact regarding DOL’s consultation with DFS and to demonstrate that the payroll debit card regulations do not, in fact, impinge on DFS’s regulatory authority, and to further demonstrate that petitioner strove to develop regulations that were related to employment issues and not banking issues. Petitioner opposes the motion, and interestingly, counsel to respondent IBA states that “the IBA declines to support the motion to strike . . . or to oppose the Petition in this [Article 78] proceeding” (Rice Affidavit, at ¶ 15; see also Verified Answer of Respondent IBA, WHEREFORE clause [“Respondent IBA declines to oppose the

Petition in this proceeding]). The IBA's counsel submits that the affidavit of the attorney from DFS "notes that an official at the [DFS] had determined that the challenged regulations would not interfere with the jurisdiction of the [DFS]. The reasons for such conclusions and the impact of payroll debit cards on regulated financial service would have provided important context in the review of the challenged regulations by the IBA" (Rice Affidavit, at ¶ 13). Counsel's affidavit continues: "The review by the IBA of Petitioner's rules, regulations and orders is facilitated by a full record; however, it appears that Petitioner and the office of the Attorney General at all times acted in good faith regarding regulations of important public interest, and without intent to adversely affect IBA review" (*id.*, at ¶ 14; see also IBA Verified Answer). This extraordinary submission and position by the agency whose decision is under review makes clear that the late submission is not an act of gamesmanship and includes information that should have been considered given the rationale of the IBA.

Respondent Global Cash Card argues that the documents mentioned above should not be permitted in this proceeding for numerous reasons, including that the materials were not part of the stipulated record that was presented to respondent IBA and that petitioner did not submit these materials as a supplement to the record when given an express opportunity to do so (Morgen Affirmation, ¶¶ 23-25), and that these documents are not properly before the Court upon judicial review of the administrative determination because they were not part of the administrative record before respondent IBA (see id., ¶¶ 36-42). Respondent Global Cash Card asserts that it will suffer prejudice if the new factual matters submitted by petitioner are considered by this Court due to the lack of opportunity to explore the facts asserted. Petitioner opposes the motion, and contends –

accurately, in the view of the Court – that it was not until respondent IBA issued its decision that the issue of her interaction with the DFS and her inquiries into the scope of her authority versus that of banking regulators was an issue in the administrative proceeding. Notably, respondent Global Cash Card’s petition to the IBA did not raise the issue of petitioner’s alleged intrusion into the banking and financial sectors – the administrative petition’s challenge to the petitioner’s authority was limited to whether petitioner had engaged in policy-making and had thus intruded into the legislative domain. Nor was the issue addressed or debated during oral argument before respondent IBA (see Kerwin Affirmation, Exhibit D). Given the statutory requirement that petitions to the IBA must “state the . . . regulation . . . proposed to be reviewed and in what respects it is claimed to be invalid or unreasonable” (Labor Law § 101 [2]), along with the directive that “objections to the . . . regulation . . . not raised in such appeal shall be deemed waived” (id.), petitioner’s failure to submit evidence addressed to whether she was intruding into the authority of banking and financial regulators is understandable. Upon consideration of the positions of all of the parties, upon the unusual facts of this matter and in light of the Court’s ultimate decision as set forth below, respondent Global Cash Card’s motion to correct the record and strike will not be granted.

Even if the issue of whether petitioner had strayed beyond the scope of her authority and intruded into the realm of banking and financial regulators was properly before respondent IBA, and assuming that its determination of that issue was not irrational because it finds support in the record that was before it, the Court nevertheless find that it was arbitrary and capricious for respondent IBA to vacate the entirety of Part 192. This Part, entitled “Methods of Payment of Wages,” provides that employees’ wages may be paid by cash, check, direct deposit, or payroll debit card (see 12 NYCRR 192-1.1). The regulation includes a definitional section (12 NYCRR 192-1.2 [a-h]), a section

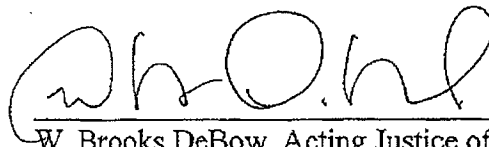
regarding written notice and consent for the various methods of payment of wages (12 NYCRR 192-1.3), and prohibited practices with regard to all methods of payment of wages (12 NYCRR 192-1.4). Subpart-2 of the regulation separately addresses rules applicable to payment by check (see 12 NYCRR 192-2.1), direct deposit (see 12 NYCRR 192-2.2), and payroll debit card (see 12 NYCRR 192-2.3). Global Cash Card's administrative petition expressly requested review of "the following sections of [Part 192]," thereafter reciting 12 NYCRR 192-1.2 (d), 192-1.3, and 192-2.3 (Kerwin Affirmation, Exhibit B, at p.12). The petition and the administrative proceeding – brought by a party whose only interests in Part 192 that were provisions applicable to payroll debit cards – were focused exclusively on those parts of Part 192 that governed conduct related to the use of payroll debit cards. Nothing in the administrative proceeding challenged regulatory provisions within Part 192 that are addressed to payment by cash, check or direct deposit. Respondent IBA is authorized – upon a finding that a regulation is invalid or unreasonable – to "revoke, amend or modify the same" (Labor Law § 101 [3]). Possessing the authority to modify Part 192, respondent IBA nevertheless vacated the entirety of it for reasons related only to payroll credit card provisions. There is nothing in the record that was before respondent IBA that provides a rational basis for the revocation of provisions related exclusively to payment of wages by check or direct deposit. Thus, it was arbitrary and capricious and without a rational basis for respondent IBA to vacate the entirety of Part 192.

Accordingly, it is

ORDERED, that the motion of respondent Global Cash Card to correct the record and strike materials therefrom is DENIED, and it is further

ORDERED, that the petition is GRANTED, and the Resolution of Decision of the Industrial Board of Appeals dated February 16, 2017 is ANNULLED.

Dated: Saratoga Springs, New York
May 23, 2018



W. Brooks DeBow, Acting Justice of the Supreme Court

Papers considered:

- (1) Order to Show Cause (Hon. Christina Ryba), filed April 17, 2017;
- (2) Verified Petition; sworn to April 17, 2017, with Exhibits A-B;
- (3) Affirmation of Adrienne J. Kerwin, AAG, in Support of Order to Show Cause, dated April 17, 2017, with Exhibits A-B;
- (4) Affirmation of Adrienne J. Kerwin, AAG, dated April 24, 2017, with Exhibits A-E;
- (5) Affirmation of Brian Montgomery, Esq., dated April 20, 2017;
- (6) Affidavit of Pico Ben-Amotz, Esq., sworn to April 24, 2017, with Exhibit A;
- (7) Memorandum of Law in Support of Verified Petition, dated April 24, 2017;
- (8) Order to Show Cause (Hon. Richard Platkin, A.J.S.C.), filed May 12, 2017;
- (9) Affirmation of David B. Morgen, Esq., in Support of Motion by Order to Show Cause to Correct the Pleadings and Record Pursuant to CPLR 405, dated May 12, 2017, with Exhibits 1-10;
- (10) Affirmation of Mayur Saxena, AAG, in Opposition to Motion to Strike, dated June 5, 2017;
- (11) Affidavit of Devin A. Rice, Esq. in Response to Order to Show Cause, sworn to June 2, 2017, with Exhibits A-B;
- (12) Reply Affirmation of David B. Morgen, Esq. dated June 14, 2017, with Exhibit A;
- (13) Order in Matter of Reardon v Global Cash Card, Inc. and New York State Industrial Board of Appeals, Albany County Index No. 2643-17 (W. Brooks DeBow, A.J.S.C., October 26, 2017);
- (14) Verified Answer of Respondent New York State Industrial Board of Appeals, sworn to December 4, 2017;
- (15) Verified Answer of Respondent Global Cash Card, Inc., sworn to December 7, 2017;
- (16) Affirmation of David B. Morgen, Esq., dated December 8, 2017, with Exhibit A (Supplemental Affidavit of Joseph M. Purcell, sworn to January 31, 2017, with Exhibit A);
- (17) Respondent Global Cash Card, Inc.'s Memorandum of Law Regarding its Standing Before the New York State Industrial Board of Appeals, dated December 8, 2017;
- (18) Reply Memorandum of Law in Support of Verified Petition Concerning the Standing of Global Cash Card, Inc. Before the Industrial Board of Appeals, dated December 22, 2017.