UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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JOHN PADBERG, CLIFFORD PAOLILLO, and RASHID AHMED, individually and on behalf of all others similarly situated,

Plaintiffs,

-Against-

DIANE MCGRATH-MCKECHNIE, RUDOLPH W. GIULIANI, JOSEPH MCKAY, MATTHEW DAUS, HARRY RUBINSTEIN, ELLIOT SANDER, HARVEY GIANNOULIS, MARVIN GREENBERG, RAMONA WHALEY, AND THE NEW YORK CITY TAXI AND LIMOUSINE COMMISSION,

00 Civ. 3355 (RJD)

Defendants.

X----------X

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AS TO THE UNCONSTITUTIONAL BIAS OF TLC JUDGES AND FOR PUNITIVE DAMAGES

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Plaintiffs submit this memorandum in support of their motion for summary judgment as to their judicial bias claim and for punitive damages and also in opposition to defendants' motions for partial summary judgment.

Preliminary Statement

Plaintiffs' claim that the defendants' so-called Operation Refusal was unconstitutional and illegal was in part based on the contention that the administrative law judges employed by the Taxi and Limousine Commission were unconstitutionally biased. On April 30, 2002, this Court ruled that the summary suspension policy was unconstitutional. The Court ruled further that the judicial bias claim was well-pleaded under 42 U.S.C. §1983, citing several facts that were established even prior to discovery. At this point, the bias of

the TLC judges has been proven beyond peradventure and summary judgment for the plaintiffs is required.[1] This brief also argues that summary judgment for defendants should be denied. It has been proven beyond dispute that defendants' actions were reckless, callous, and knowingly illegal, going so far as to defy this Court. Not only should they be denied qualified immunity, the plaintiff class is entitled to *punitive damages as a matter of law*.

In its April 30, 2002 Memorandum and Order (the 2002 Ruling)[2] this Court held that Plaintiffs could "overcome the presumption of honesty [of the TLC judges] by showing that, 'under a realistic appraisal of psychological tendencies and human weakness,' the circumstances surrounding the proceedings posed 'a risk of actual bias or prejudgment' that would offend due process." Citing *Withrow v. Larkin*, 421 U.S. 35, 46, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975) and *Gibson v. Berryhill*, 411 U.S. 564, 578, 93 S. Ct. 1689, 36 L. Ed. 2d 488 (1973). As noted in those cases, bias can arise from a prejudgment of the facts or personal interest. Plaintiffs have established both forms of bias based on evidence that is undisputed.

In its 2002 Ruling, the Court noted three facts that point to bias. First, the Court noted the claim that "the TLC ALJs were well aware of the TLC's desire to impose harsher punishment for service refusals and were receiving pressure to impose penalties of license suspension and revocation for first and second service refusal offenses." Second, the Court cited the memorandum sent on February 18, 2000, by Chief Administrative Law Judge Lisa Rana to the rest of the TLC ALJs concerning adjudication of service refusal cases under Operation Refusal. In that memorandum, Chief ALJ Rana advised the TLC ALJs that taxi

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[1] In addition, plaintiffs have moved to amend the complaint to add several new state and federal claims, and to assert new facts learned during the course of discovery. The new claims assert, *inter alia*, that the revocation policy, which the Court found was not unconstitutional, violated state law.

[2] 203 F. Supp. 2d 261.

drivers who committed unjustified service refusals were being cited by TLC agents under both §2-50 and under §2-61(a)(2). She then stated:

> Please be advised that, upon a finding of a refusal, the Commission's policy *requires* that both the Rule 2-50B *and* Rule 2-61A2 violations be sustained. Furthermore, where the Commission is seeking revocation in an Operation Refusal case, if the ALJ does find a violation of Rule 2-50B and Rule 2-61A2, the ALJ *must* submit to the Chairperson a recommended decision for the Rule 2-61A2 violation. (*emphasis added*)

Third, the Court noted that the TLC ALJs were allegedly "especially vulnerable to this pressure because ALJ Rana was in charge of assigning cases to TLC ALJs." The Court concluded, "The Rana Memo raises a legitimate question as to whether the TLC ALJs were finding violations of both rules based on the facts of the case, or whether they were 'prejudging the facts' and merely tacking on a finding of liability under §2-61(a)(2) and revoking licenses pursuant to the TLC policy." 203 F. Supp. 2d at 288.

These facts are now undisputed, as are many others detailed below. Amazingly, in defendants' memorandum in support of their motion for summary judgment, *they do not even mention* the Rana Memo. They forget all about it even though this Court relied on it in sustaining the claim. They also ignore, among other items, the TLC's defiance of this Court and the fact that they never received a single memorandum (or writing of any sort) from the Corporation Counsel supporting their policy. They brush aside the secret manner in which it was decreed. Defendants' omission of critical facts is one of many reasons that defendants' motion is frivolous. Plaintiffs apologize to the Court for submitting a lengthy brief. But our action was made necessary by defendants' deceptive and frivolous recitation of the record.

Evidence of bias goes well beyond the Rana Memo—which the TLC ALJs followed universally and without analysis or comment. TLC ALJs were per-diem, at-will employees. They had no tenure or term in office. They could be fired for any reason or no reason. The

TLC, in the words of the Declaration of Independence, "made Judges dependent on [its executives'] Will alone for the tenure of their offices, and the amount and payment of their salaries." The Declaration of Independence (list of grievances) (1776). This circumstance alone was recognized by the framers of the Constitution as impermissibly compromising to judicial independence. *See O'Donoghue v. United States*, 289 U.S. 516, 531 (1933); *see also Haas v. County of San Bernardino*, 27 Cal 4th 1017, 45 P.3d 280 (California Supreme Court 2002) (hiring of an administrative law judge on a per diem basis violates due process).

There is more. Many TLC judges were, in fact, fired, including several for crossing the TLC Legal Department—the same legal department that prosecuted the more than 500 Operation Refusal cases. ALJs who pleased the legal department, on the other hand, could be promoted from judge to lawyer at dramatically higher salaries. That same legal department repeatedly contacted its judges about TLC policy on an *ex parte* basis, often purporting to require the enforcement of policies—including Operation Refusal, but not only Operation Refusal— that were not properly enacted. The TLC judges were kept in the dark about pertinent legal developments. If a driver sought an appeal of an Operation Refusal ruling, that appeal was heard by the TLC Chairwoman. This was the same woman who, on instructions from the Mayor, decreed the Operation Refusal policies in the first place.

Fearing for their jobs, which could be lost at any moment, it is no wonder that the TLC judges ruled in lockstep, enforcing policies that OATH judges declared illegal and even policies that this Court held unconstitutional. It is no wonder that they believed they had no authority to rule on issues of law. And, at the end of the day, they convicted accused cabbies

86% of the time,[3] despite the fact that the cases involved what this Court called "highly subjective factual disputes."[4] In short, the evidence in this case goes far beyond *Withrow* or *Gibson* or any other Supreme Court cases in which the Court held that the prospect of judicial bias rendered the process unconstitutional. The bias was not merely a realistic possibility, it was actual and manifest in the ALJs' decisions.

STATEMENT OF UNDISPUTED FACTS

The following facts are admitted or undisputed, except where a dispute is noted:

A. At-Will, Per Diem Employment:

The TLC tribunal employs roughly 60 judges at a given time;[5] together they decide more than 100,000 cases per year.[6] For years, the TLC courts were kept closed to the public, though the policy was illegal, and defendants have acknowledged that they had no written regulation (or policy) permitting them to do so.[7] The TLC judges are at-will employees with no fixed term in office, serving on a per-diem basis. They are hired and could be fired by the chairperson of the TLC, who acts on recommendation of the general counsel and the director of adjudications.[8] The general counsel could fire judges, and did so regularly.[9] The same

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[3] This statistic is according to TLC data. *See* Affidavit of Charles Tortorici, the TLC's acting general counsel, sworn to Dec. 2, 2004, ¶ 14, Exh. A to the Biberman Declaration.

[4] 108 F. Supp. 2d at 188.

[5] Deposition of Lisa Rana pp. 13, 82 (though noting that the number of judges varied from time to time). Depositions excerpts, annexed to the Declaration of Daniel Ackman, sworn to Dec. 13, 2004, will be cited hereafter by name and page number.

[6] Mayor's Management Report Fiscal 2001, p. 171 (stating that in FY 2001, the TLC adjudicated 105,795 summonses through final disposition; the goal for FY 2002 was 100,000). Exhibit 11 to the Declaration of Daniel Ackman, sworn to Dec. 13, 2004 ("Ackman Decl.") Declaration exhibits will hereafter be cited as PX __.

[7] McKay 156-157; Diane McGrath-McKechnie 23-24; Letter stipulation dated Nov. 1, 2004, PX 15. *See also Ackman v. Giuliani*, New York Law Journal March 17, 2000 (where the closed-door policy was held illegal).

[8] McGrath-McKechnie 51-52; Daus 186; McKay 58-59; Rana 47. TLC judges start on "probationary status."

[9] Between 1998 and 2000 alone 35 judges were fired. See termination letters compiled at PX 14.

general counsel supervised the director of adjudications, who supervised the judges on a daily basis.[10] The general counsel also supervised the TLC lawyers, who acted as prosecutors in Operation Refusal cases.

In contrast to administrative law judges in the federal system, TLC ALJs lack even civil service protections.[11] The judges apply to work a certain number of days each month,[12] stating the days they wish to work, and (in some cases) at which court they prefer to work.[13] TLC ALJs have, however, no legal right to work any particular number or days or hours per week, or in any particular court.[14] Nor is there any fixed practice for assigning hours.[15] While the TLC tried to fill the courtrooms at its various tribunals (Rector Street in Manhattan, Long Island City, JFK Airport and Staten Island), there was no established criteria for determining who among the judges would be allowed to work at particular times or particular courts.[16] TLC Judges were told they were at-will and thus could be summarily fired at any time.[17]

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[10] McKay 58-59.

[11] Rana 65; Daus 300-301; Eckstein 134.

[12] Rana 79, 228-235

[13] Eckstein 73; Rana 79.

[14] Daus 302; Rana 236-237.

[15] The TLC did have a general policy that ALJs should not work more than 1000 hours per year, lest they be determined employees. Rana 263-264; Eckstein 128-29. But, in fact, as their pay records show, some ALJs worked more than that; others worked much less.

[16] Scheduling was done by the TLC adjudications department and by supervisory ALJs, who were themselves supervised by salaried TLC officials. Though it was hard to get a straight answer on this point, the TLC had roughly 15 judges sitting on a given day. The number of judges on its roster ebbed and flowed as judges were fired or quit. Each ALJ was expected to commit to two days a week, though some worked more and others worked less. If, in fact, 60 judges each requested to work two days, the demand for hours would exceed the supply. There were no criteria for rationing the work when there were more requests than there were slots to fill. Mr. Eckstein, the current deputy commissioner for adjudications, described the assignment process as "juggling." Eckstein 129.

[17] Pistone Decl. ¶ 3, PX 12; Fioramonti 14.

Once assigned hours by the TLC's director of adjudications and the chief ALJ, an ALJ's work is closely monitored by the director of adjudications, who, as noted, reported to the general counsel.[18] The supervisors observe the judges to insure they were familiar with TLC policies and could "correct their behavior" when they acted incorrectly. Supervisors (either the director of adjudications, or supervisory judges) also observe judges as they conducted hearings.[19] All TLC ALJ start on "probationary" status.[20]

Judges are also instructed to keep worksheets indicating how many hearings they held and how many resulted in convictions as opposed to acquittals.[21] They are constantly prodded to increase revenues.[22] In the words of one former TLC ALJ, "We knew who buttered our bread… . TLC judges were supposed to have a predisposition to rule in favor of the agency."[23] TLC executives also determine which ALJs are appointed to supervisory roles, which are named appeals judges, and who is named chief judge.[24]

B. Handpicked Operation Refusal Judges:

Not all TLC judges were assigned to Operation Refusal cases. In fact, just a small subset of the judges was so assigned. Indeed, of the 138 judges who worked for the TLC

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[18] McKay 58-59. ALJs were also supervised by the chief ALJ and supervisory ALJs. Eckstein 75. The precise reporting arrangement has recently changed. Ms. Rana described the review process as follows (at 74):

> If there was an issue with an ALJ in that there was some kind of a problem, they are coming in late all the time, you would sit down and we would speak with the ALJ and try to correct that behavior, explain to them what the issue was that was problematic, try to correct that behavior. And if in fact it persisted we could talk to them again, we could write a memo to them explaining to them in writing that 'We've spoken to you, we've tried to correct this behavior, it's persisting, and we need to correct the behavior.' So that would be an example of a review.

[19] McKay 66; Rana 72-73.

[20] McKay 60.

[21] McKay 69

[22] Glicksman Declaration, ¶ 7, PX 41.

[23] Id.

[24] Daus 302-303; Rana 236.

between 1999 and 2002, just 23 heard Operation Refusal cases. An even smaller group—five judges—decided 60% of the Operation Refusal cases. Ten judges decided 80%.[25] The Operation Refusal judges were selected by Ms. Rana, who "basically directly supervised" them, according to Mr. McKay. Mr. McKay added that these judges "historically" heard consumer complaints. Of course, none of the Operation Refusal cases were brought by consumers.[26]

C. At Least 47 Judges Fired In Fact:

That judges could be fired was not simply theory. Judges were, in fact, fired all the time, including while Operation Refusal was being enforced most vigorously. In 1998, 18 judges were fired. Another 14 were fired in 1999, including 13 in the three months just prior to Nov. 11, 1999, the date of decree for Operation Refusal. The TLC fired three judges in 2000 and another 15 in 2002. [27] Others resigned and, in general, turnover was high.[28]

Defendants submit a two-page affidavit from Mr. Eckstein—once a TLC ALJ, later promoted to prosecutor, and elevated again to deputy commissioner—who concludes "in his experience" he has not known of any TLC judge being fired or disciplined for ruling against the wishes of the agency.[29] There is much evidence to dispute this claim.[30] Indeed, even this self-serving affidavit does not deny that they could be fired for that reason or for no reason.

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[25] These statistics are based on an analysis of 300 Operation Refusal decisions performed by plaintiffs' counsel. *See* Ackman Decl. ¶¶ 3-11 and PX 13 (hereafter "Plaintiffs' Analysis").

[26] McKay 82-85

[27] These numbers are based on termination letters produced in discovery. Most of the terminations were said to be "for inactivity." Examples of such letters are at PX 14. But the TLC has produced no evidence that the TLC itself did not create the inactivity by denying the later-fired ALJs work hours.

[28] ALJ Frank Fioramonti testified that of the 15 prospective ALJs in his 1996 training class, just two that he is aware of are still employed. Fioramonti 143-144.

[29] The affidavit is the second part of Exhibit A to the Biberman Declaration.

[30] In addition, it is legally irrelevant whether they were fired. The point is, they might have been, and no one disputes that possibility; nor could they. *See* below at p. 41.

Moreover, Mr. Eckstein admitted that "Some [ALJs] don't get as many as they want."[31] He also admitted that 100% of the TLC ALJs who received the Rana memo followed it.[32]

In fact, at least several judges were fired for failure to sufficiently subordinate themselves to Daus and TLC "policy."[33] Diane McGrath-McKechnie admitted as much to one longstanding ALJ, Richard Cohen, after he was summarily terminated. Mr. Cohen was fired on August 27, 1999 "effective immediately" by memo from Mr. McKay and Ms. Rana. He was told to surrender his agency identification and ushered from the building. When he challenged the action, Ms. McGrath-McKechnie responded he was fired because of his "failure to conduct proper hearings, [his] lack of productivity, and [his] failure to demonstrate a willingness to adhere to Commission policies and procedures."[34] There is no evidence that the TLC ever found his performance unsatisfactory prior to his sudden firing.

Another longstanding ALJ, Eugene Glicksman, was summarily terminated on Sept. 17, 1998 because he displeased the agency and Mr. Daus. Mr. Glicksman's first offense was that he was suspected of sending an anonymous memorandum to a TLC clerical supervisor complaining about certain ministerial work policies such as the amount of notice required to justify a sick day.[35] Daus responded angrily to this memo, calling it a "cowardly act." He went on to deny that he knew who sent the memo or that he gave it much thought.[36] But Mr.

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[31] Eckstein 134.

[32] Eckstein 156-157.

[33] Few judges challenged their terminations—after all, their employment was at-will. The defendants have offered no evidence as to the reasons for the terminations apart from the brief termination letters. Defendants have presented no proof, for example, concerning judges fired for "inactivity." It is a reasonable inference—and certainly a jury question— especially given that many judges resigned, that those branded as inactive were simply denied work by the agency as a prelude to termination.

[34] Letter from Diane McGrath-McKechnie to Richard Cohen, dated Oct. 1, 1999. PX 16.

[35] The memo and Mr. Daus's response ("inappropriate and offensive") are included in PX 17.

[36] Daus 467.

McKay admitted that the "scuttlebutt within the agency" was that Mr. Glicksman was the author (though he denied it). Mr. Glicksman was placed on inquest duty.[37] He was then accused of dismissing summonses where he believed taxi drivers had been overcharged by an inspector. TLC judges were expected to sign off on the charges where the taxi driver did not appear. As Glicksman refused to do so, he was fired.[38] "If you don't [knuckle under] you may not be working for long," Mr. Glicksman testified. "The effect is to undermine your independence."[39]

On August 13, 1998, Dominick Pistone, a lawyer with a distinguished resume, was summarily fired without stated cause. Mr. Pistone had recently been promoted from being a per-diem ALJ to the full-time director of adjudications (though he was not yet on the civil service rolls). He was fired after a series of policy disputes with Mr. Daus, essentially over whether the staffing for the tribunal was adequate (as the agency was short-handed of judges) to give each case its due. On the day of his termination, he was summoned to Mr. Daus's office. Mr. Daus left as Mr. Pistone arrived. So rather than see Mr. Daus, Mr. Pistone was called into the office of the agency chief-of-staff, who handed him a memo telling him he was fired "effective immediately."[40]

When Mr. Daus fired Mr. Pistone, who had been associated with Paul Weiss Rifkind Wharton and Garrison and Schulte Roth and Zabel, he hired Mr. McKay as director of adjudications. Mr. McKay had just one year as an ALJ to his credit and his sole legal

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[37] Inquest duty was deciding cases where the respondent did not appear and there was no hearing. Mr. McKay called it a "paperwork job" and admitted, "The judges really didn't like it very much." McKay 243; Pistone Decl. ¶ 7.

[38] Glicksman Decl. ¶¶ 24-35. Though Daus called Glicksman to his office, he had chief of staff David Hind do the firing, the same pattern that would occur with Dominick Pistone. At the time, and Hind refused to give a reason for the sudden termination. Glicksman Decl. ¶¶ 9-10

[39] Glicksman Decl. ¶ 35.

[40] Pistone Decl. ¶¶ 7-12.

experience had been as a solo practitioner. Mr. McKay was, however, a law school classmate of Mr. Daus (as was Lisa Rana).[41] All told, given the volume of terminations, and the fates of Mr. Cohen, Mr. Glickstein and Mr. Pistone (among others) it would have been impossible not to know that any judge who defied "policy" in any way, would likely find himself or herself out of a job.

D. Paying the ALJs:

In addition to the stick (termination, loss of hours) the TLC held the carrot. As the TLC ALJs worked on a per-diem basis, their pay could vary dramatically and, in fact, it did. The TLC has produced a document listing the compensation of 138 ALJs between 1999 and 2002. (Defense counsel claims records for 1998 are unavailable.) The average total compensation for the ALJs was $38,129 during the four-year period, or roughly $9,500 per year.[42] Of the 138, 11 were paid more than $100,000. These elite 11 were paid an average of more than $35,000 per year. Thus, the highest paid judges could make nearly four times what the average judge was paid. (Of course, we assume they worked more days.) This stark financial discrepancy is more than enough to induce bias.

The second highest paid judge of all was William Best. He was paid an average of $40,509 per year after starting as an ALJ in April 2000.[43] In his first two full years, he was paid $44,450 per year. Also among the highest paid were Lisa Rana, who was chief judge until 2001, and Elizabeth Bonina, who succeeded her as chief after Rana was promoted to a staff job.

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[41] McKay 27-28.

[42] Plaintiff's Analysis, PX 13. Not all judges were employed all four years. The pay records themselves are shown by PX 38.

[43] Best 33 (as to his hiring date). The highest paid ALJ, Vincent Verdi, was not assigned Operation Refusal cases, but he was promoted to a staff job.

Highest Paid TLC ALJs (1999-2002)

TLC ALJ	Years	Total Pay ($)	Avg./Year ($)
Verdi, Vincent	3	124,654	41,551
Best, William	3	121,526	40,509
Schneider, Judith	4	160,962	40,241
Smolian, Richard	4	154,202	38,551
Rivers, Diane	4	148,084	37,021
Coyne, Thomas	4	146,503	36,626
Sherbell, Gary	3	101,699	33,900
Rana, Lisa	4	134,680	33,670
Bonina, Elizabeth	4	129,071	32,268
Sterbin, Joanna	4	124,453	31,113
Rosinger, Buniselda	4	101,456	25,364
AVG		**131,572**	**35,528**

As it happened, Mr. Best decided more Operation Refusal cases than any other judge.[44] He convicted the accused taxi driver *every* time—a perfect 100% record of conviction. Mr. Best also recommended revocation 86% of the time. This record made him the harshest sentencing judge by far (other than the judges who decided fewer than five cases).[45] At his deposition, the evasive Mr. Best testified he could not recall how much he earned from his law practice before joining the TLC, not even whether it was more or than $5,000 or more than $1 million.[46]

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[44] Mr. Best decided 36 out of 246 cases studied (not counting settlements), or just under 15% of the total. Just two other judges decided more than 30.

[45] Plaintiffs Analysis, PX 13. The judges as a group convicted the drivers of refusal 77% of the time and recommended revocation 44% of the time (not counting settlements).

[46] Mr. Best testified as follows (Best 34):

> Q. Did you have any earnings as a lawyer in the year prior to being a TLC judge?
> A. I'm sure I did.
> Q. How much?
> A. I don't recall.
> Q. More than $5,000?
> A. I don't recall.
> Q. You don't know if you earned more than $5,000?
> A. I don't recall.
> Q. Do you know if you earned more than $1,000?
> A. I don't recall.

Mr. Best was far from expert even in TLC matters. He testified, for instance, that the penalty for the violation of TLC Rule 2-61A (acts "against the best interests of the public") was a $150 or $250 fine.[47] Getting the TLC "policy" completely backward, he thought it was TLC Rule 2-50 that mandated revocations. This extraordinary testimony came despite the fact that it was TLC policy to charge violations of Rule 2-61A because it was that rule that—in the TLC's stated view—permitted revocation. And Mr. Best was the primary judicial enforcer of that policy!

Ms. Rana, of course, wrote the memo telling her fellow ALJs how to decide Operation Refusal cases. As an ALJ she was paid more than $44,000 per year in her last three full years. She was later promoted to TLC Chief of Staff at a salary of "approximately $103,000 a year."[48] Ms. Bonina decided what Diane McGrath-McKechnie touted as the "seminal" Operation Refusal decision (see below). She was later promoted to chief ALJ.

Q. Do you know roughly how much you earned?
A. I don't recall.
Q. But you don't know if it was more than $1,000?
A. I don't recall.
Q. Was it more than $500?
A. I don't recall.
Q. Was it more than $1,000,000?
A. I don't recall.

[47] Mr. Best testified at 134-135:

Q. Now as far as you are concerned, would Rule 2-61(a) allow the revocation or Rule 2-50(b) allow the revocation?
MR. HOROWITZ: Objection to the form of the question.
A. 2-50(b).
Q. 2-50(b) is what allowed the revocation?
A. Yes.
Q. What did 2-61(a) add to the equation?
A. It's a separate penalty for 2-61(a).
Q. What's the penalty for that?
A. I think 150 or 250, plus three points. I think that's what it is.
Q. It wasn't revocation?
A. I don't remember.

[48] Rana 37-38.

By contrast, Michael Schwartz, also one of the most active judges in Operation Refusal cases, was paid $45,495 over four years, or $11,374 per year. In deciding 34 Operation Refusal cases, he convicted the drivers 65% of the time and revoked their licenses 35% of the time.[49] Indeed, of the five judges who decided 14 or more Operation Refusal cases, Mr. Schwartz was paid by far the least (the other four averaged over $32,000). The lower-paid Mr. Schwartz convicted less often and revoked less often than the others—who were paid three times as much.[50]

E. Promoting Favored ALJs—With Dramatic Pay Hikes:

The financial reward could be even more dramatic when ALJs were promoted to the TLC salaried staff.[51] This happened often.[52] Of course, only at the TLC is the move from judge to prosecutor considered a promotion.[53]

Joseph Eckstein made $22,761 in 1999, his last full year as an ALJ. On the side, he managed a fitness club.[54] In April 2000, Mr. Eckstein was promoted from judge to lawyer, becoming assistant general counsel in the TLC's legal department.[55] Starting salary: $69,500.[56] In September 2001, he was named assistant commissioner for adjudications,

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[49] The 13 judges who decided just a few cases (8 or fewer) convicted the drivers at about the same rate, but they ordered revocation much less, just 37% of the time, compared to 54% for the top five judges.

[50] The top five judges decided 59% of the cases. Just 10 judges decided 80% of the cases. See Plaintiffs' Analysis, PX13.

[51] Other ALJs were promoted to supervisory status. Mr. Best received this type of promotion. Best 43-45. Other ALJs were permitted to work on "special projects," that is on tasks other than hearing cases, such as compiling statistics or working on a book of profiles for the judges. Mr. Eckstein and Mr. McKay received these assignments. Eckstein 76, 89; McKay 168. Supervisory assignments were made by TLC executives and the chief judge. Daus 303.

[52] Mr. Daus called it a "common practice." Daus 21-22.

[53] See Eckstein 52 ("Yes. I considered it a promotion, yes.")

[54] Eckstein 16.

[55] Eckstein 15.

[56] Eckstein 52-53.

where he helped supervise the ALJs. Less than two years later, he was named deputy commissioner in charge of adjudications. His current salary is $95,000, more than four times what he earned as an ALJ.[57]

Idelcy Lando was an ALJ. She was later hired by the TLC legal department at a substantial increase in pay. Vincent Verdi was another ALJ hired as a staff attorney. Peter Mazer was an ALJ at one time. He was hired as a lawyer and later promoted to deputy commissioner and general counsel.[58] Joseph McKay was a per-diem ALJ, albeit for just one year. After Mr. Daus fired Mr. Pistone, Mr. McKay was hired as the agency's adjudications director. He was later promoted to assistant commissioner.[59] Like Mr. McKay, Ms. Rana was a law school classmate and friend of Mr. Daus. She was promoted to chief ALJ. Later she was named TLC chief-of-staff, and was not required even to interview or apply for the position.[60] The latter promotion—her starting salary was $103,000[61]— doubled her income (even counting income she earned as a lawyer).[62]

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[57] Eckstein 57. He no longer manages the gymnasium.

[58] Daus 21.

[59] McKay 7.

[60] Ms. Rana, interrupted by frequent and improper objections from defense counsel, testified as follows (Rana 56-57):

> Q. Had you had any administrative experience prior to being named Chief of Staff?
> MR. HOROWITZ: Objection to the form of the question.
> A. Would you be more specific? I'm not clear as to what you're asking.
> Q. What is difficult? You don't know what the term "administrative experience" means?
> MR. HOROWITZ: I don't. Objection to the form of the question.
> A. I don't understand your question.
> Q. Have you ever had an administrative role in a governmental organization prior to becoming Chief of Staff for the TLC?
> MR. HOROWITZ: I'm going to object to the form of the question.
> A. I don't know what you mean by 'administrative.'
> Q. Supervisory role.
> A. I was the Chief Administrative Law Judge for the Taxi and Limousine Commission prior to becoming the Chief of Staff.
> Q. Did you interview for the job Chief of Staff?
> A. No.
> Q. Did you apply in some way?

Finally, Dominick Pistone was promoted from ALJ to director of adjudications. He was, however, never placed on civil service status. Thus, when he displeased Daus, he was summarily terminated—handed a memo by the TLC's former chief-of-staff.[63] Mr. McKay, who had far less experience both as a lawyer and even within the TLC, was installed in his place. Thus, TLC ALJs who pleased the agency could be rewarded with additional employment, staff jobs, and much higher salaries. Others might have their hours, and thus their pay, reduced. Still others could be—and were—fired without cause.

F. How the Legal Department Controlled Information; *Ex Parte* Contacts:

The TLC executives controlled the judge's purse strings. They also controlled the information.

First, the TLC's general counsel (Matthew Daus before he was promoted to chairperson) was also the boss of the adjudications department.[64] His supervisory role meant that he played a key part in hiring and firing judges. It meant also that he determined what law those judges would know, and what law they would be denied.

TLC judges, like judges in other tribunals, produce written decisions. But these decisions are not indexed or published.[65] Nor are the decisions available to the public.[66] TLC case law is disseminated, if at all, through distribution by TLC executives to the ALJs.

A. No.

[61] Rana 38.

[62] Rana 37-38; Rana testified she earned about $20,000 per year as a lawyer while serving as an ALJ. PX 19.

[63] Pistone Decl. ¶ 4 .

[64] McKay 241.

[65] Daus 270.

[66] Mr. Daus testified, to obtain a TLC decision, an interested party would have to file a Freedom of Information Law request. Daus 267-68. Joseph McKay, who was deputy commissioner for adjudications, said he did not know how TLC cases might be researched. McKay 195 ("I guess then you'd have to ask [the lawyers who wanted to conduct the research])."

Though the distribution is handled physically by the agency's adjudications department, it is the legal department that selects what decisions—that is what law, apart from TLC regulations—its judges should know.[67] The adjudications department also had a practice of communicating TLC policy to its judges by memo (as opposed to through rule-making). Mr. McKay, who Mr. Daus hired to run his adjudications department, testified:

> A As I said if there was something that came down, an in-house decision on law that came down on an appeal for some type of outside case law and if the Law Department became aware of it, they would inform me and I would pass that information, not the Law Department, TLC's legal department and that would be passed on to me and again if I became aware of that information, I would have been obligated to pass that onto the judges.
>
> Q So the Law Department told you what law judges should know, is that correct?
>
> MS. BIBERMAN: Objection to form.
>
> A The legal department.
>
> Q The legal department of the TLC told you what law that they wanted the judges to know?
>
> MS. BIBERMAN: Objection.
>
> Q Is that correct?
>
> * * *
>
> *A The legal department had oversight with regard to informing the judges of the law that they should know and handling any legislative policy or rule making on behalf of the agency, so that type of information, the rules and the policies would come from -- can I please finish my answer -- would have come from the legal department.*[68]

This practice had a tremendous impact on the tribunal generally, and on Operation Refusal in particular. First, the legal department would determine which TLC appeals decisions it would relay to the judges. It determined which policies would be communicated. These communications were all *ex parte*: Neither the taxi drivers nor the lawyers who

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[67] McKay 90-91.

[68] McKay 90-91 (italics added).

represented them were ever given notice of the appeals decisions handed to the TLC judges.[69] They were not copied on the memos.[70]

G. The Operational Refusal Decree:

On or about November 10, 1999, former Mayor Giuliani, former NYPD Commissioner Safir, and former TLC Chairwoman McGrath-McKechnie held a press conference. The subject was the announcement of Operation Refusal. The way Operation Refusal was decreed is a basis for several of plaintiffs' state law claims: specifically, that the TLC failed to comply with the notice and comment provisions of the City Administrative Procedure Act (CAPA) and it acted on orders from the Mayor, who, per the City Charter, had no authority.[71] But the critical point here is that the TLC never passed a rule. It never even sent out a so-called industry notice[72]—though Ms. McGrath-McKechnie would later claim, falsely, that it had done so. There was not so much as a press release. Rather, the only notice was by press conference, and what would be reported in the media.

In their brief, defendants continue the falsehood that "the chairperson publicly declared" that "an act of service refusal [was] a threat to the public."[73] They cite nothing in the record. Indeed in their Rule 56.1 statement, they speak the truth: "[T]he TLC chairperson issued a directive…." (¶ 12) This directive was not made public; it went to "enforcement personnel."

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[69] McKay 193-194. There is a discrete bar of lawyers who habitually appeared in TLC courts in defense of cabbies. There are also so-called TLC representatives, non-lawyers licensed by the TLC to appear in the TLC courts on behalf of drivers. Both groups were known to TLC officials and easily could have been kept abreast of the communications made to the judges. McKay 200-202.

[70] McKay 202-206; 210-211.

[71] To date, defendants have successfully sought protective orders as to any deposition of Mr. Giuliani. They were required to respond to a notice to admit instead. They have moved for an extension of time.

[72] Defendants stipulated to this fact by letter dated Nov. 1, 2004. Pl. Ex. 20.

[73] Defendants Memorandum of Law p. 7.

At the press conference, which was reported all over the world, Mr. Giuliani clearly stated his desire for the TLC to suspend taxi licenses without affording the drivers a hearing—the summary suspension policy. The former mayor said: "So, one of the things that we're gonna add to this to get everyone's attention is something that we're legally entitled to do and it's a perfectly appropriate time to do it, and that is that we're gonna take a cab. If you are given a summons for service refusal, either distance service refusal or race-based, we—we will at that point suspend your hack license."[74]

But neither he nor the chairwoman announced the other aspect of Operation Refusal: the first-strike revocation policy. Indeed, Ms. McGrath-McKechnie publicly stated just the opposite.[75] Asked the penalties that would apply, she held up a flier and said: "The summonses right now are for a dollar figure. And these [fliers] by the way, I believe are in almost every cab in New York or at least they should be. And it's $250— $200 to $350 on the first offense, and the second offense is $350 to fine with possible suspension, and then a mandatory—revocation, if you commit the offense again."[76] If the mayor and the chairwoman wanted harsher penalties, they both admitted they would have to seek an

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[74] Press Conference Transcript, p. 2, PX 21.

[75] At her deposition on Aug. 20, 2004, the former chairwoman testified that she could not recall whether there was a press conference. McGrath-McKechnie 33. When the deposition was continued on Oct. 20, 2004 she recalled that there was a press conference, but she could not recall what she said or if she said anything at all. McGrath-McKechnie 357-58. Defendants did not produce the videotape of the press conference. Plaintiffs discovered a copy independently. *See* Order by Judge Gold dated Dec. 3, 2004 mandating that Ms. McGrath-McKechnie's deposition be continued as a result.

[76] Press Conference Transcript, p. 8, PX 21.

This statement, of course, was simply the law. As much as the TLC has tried through the years to circumvent it, Code section 19-507, entitled "mandatory penalties," bars a cabbie from "refus[ing], without justifiable grounds, to take any passenger or prospective passenger to any destination within the city."

The same provision sets forth the penalties for violations. For a first service refusal offense, a driver "shall be fined not less than two hundred dollars nor more than three hundred fifty dollars." Id. For a second offense within a twenty-four month period the driver "shall be fined not less than three hundred fifty dollars nor more than five hundred dollars, and the commission may suspend the driver's license of such driver for a period not to exceed thirty days." Id. Finally, for a third offense within a thirty-six month period, "the commission shall revoke the driver's license." The TLC's own service refusal regulation, TLC Rule 2-50B, tracks the Code.

amendment to the law from the City Council. Agreeing with the mayor, Ms. McGrath-McKechnie said: "[T]he refusal portion [is] covered in the Administrative Code of the City of New York, which is the City Council—the thing that I just showed you. So it is important that we have dialogue with the City Council."[77] Later, of course, her lawyers told a different story.

On November 11, she issued a directive to "all enforcement personnel"—which was never made public—to issue summonses for both service refusals (TLC Rule 2-50A or B) and for actions "against the best interests of the public" (TLC Rule 2-61A2).[78] TLC inspectors proceeded to issue the summonses as directed. It was TLC Rule 2-61A that the TLC would argue—later, once the cases were already in court—permitted revocation.[79]

H. The OATH Rulings Hidden and Ignored; the Rana Memo:

Initially, the TLC prosecuted its Operation Refusal cases before judges of the city's Office of Administrative Trials and Hearings ("OATH").[80] In a series of more than a dozen well-reasoned decisions, the OATH judges rejected the TLC's Operation Refusal revocation policy as illegal. Even when the OATH judges determined the drivers were guilty of a

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[77] Press Conference Transcript p. 13, PX 21.

[78] PX 22.

[79] In a footnote, defendants argue that their new policy was later "upheld' by the Appellate Division in *Arif v. The New York City Taxi and Limousine Commission*, 3 A.D. 2d 345 (2d Dep't 2004), *leave to appeal granted*, 2004 N.Y. LEXIS 988 (Ct. App. May 6, 2004). This assertion depends on a misstatement of the case. First, the *Arif* Court stated that its Article 78 jurisdiction was "limited to a determination of whether the administrative action was arbitrary and capricious or lacks a rational basis." So that is all it decided. This certainly seemed to misstate the law as the Court of Appeals has routinely exercised its jurisdiction in Article 78 cases to challenge whether an agency's interpretation of a statute or rule was consistent with law. *See, e.g. Matter of Trump-Equitable Fifth Ave. Co. v Gliedman*, 57 N.Y.2d 588 (1982). Thus, the Court of Appeals quickly granted leave to appeal. The TLC responded by offering to settle. They paid the plaintiff $7,500 and arranged for him to receive a new license. PX 23.

[80] According to the TLC, its regulations permitted Operation Refusal summonses issued after Jan. 1, 2000, which had previously been adjudicated by OATH, to be moved into its own court and decided by its own judges.

service refusal, they determined—each and every time—that *the law did not authorize the penalty of revocation and recommended a fine as the only lawful punishment.* This determination was in line with what Ms. McGrath-McKechnie had told the public on November 11, 1999.

The OATH judges cited Section 19-507 of the New York City Administrative Code, which governs service refusal and establishes penalties. They considered the "general enforcement provisions" cited by TLC prosecutors. They cited New York state Court of Appeals cases on statutory construction. They reviewed case law on administrative rulemaking and decided the TLC's "policy" was "ultra vires and therefore unenforceable" despite "legitimate enforcement objectives."[81]

All the OATH judges ruled, in the words of one, "despite the legitimate policy interests advanced by [the TLC]…the penalties for service refusals are set by law." The judge in this case went on to say, "Section 19-507 (b) of the Administrative Code is a particular legal provision and controls here. It does not permit license revocation for a first-time refusal offense." *Taxi and Limousine Commission v. Park*, Oath Index No. 1014/00 (Feb. 2, 2000).[82] Another OATH judge held flatly, "[T]he Commission lacks authority to utilize this provision to seize and revoke the hack licenses of drivers for an offense which the Administrative Code specifies is punishable by fines."[83]

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[81] *Taxi and Limousine Commission v. Park*, OATH Index No. 1014/00 (Feb. 2, 2000), PX 24.

[82] *Id.*

[83] *Taxi and Limousine Commission v. Khan*, OATH Index No. 1122/00 (Feb. 22, 2000), PX 24.

What did the chairwoman and her general counsel do about the OATH decisions? As a litigation strategy, they protested, but did not appeal.[84] As a legal and policy matter, they ignored them.[85] And as to their own judges—and this is the point that relates directly to the bias of the TLC tribunal—they hid the fact. Nor is there any evidence that the TLC even discussed these decisions with the Corporation Counsel.[86]

The TLC never told any of its own judges how the OATH judges had ruled.[87] Indeed, TLC ALJs Fioramonti and Best both testified that they had never even heard of section 19-507 of the Administrative Code—the section that specifically governs service refusals—despite the fact that they both sat as judges in dozens of service refusal cases. All they knew were the TLC's own rules.[88]

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[84] On April 12, 2000, Diane McGrath-McKechnie wrote a letter to Rose L. Rubin, Chief Administrative Law Judge of OATH, asking that all the OATH rulings be "reconsidered." Judge Rubin rejected McGrath-McKechnie's advice, calling it "most unorthodox" and "misplaced." Even if the suggestion were properly made, "[T]he arguments [made by the TLC chairwoman] were also made to the presiding OATH Administrative Law Judges, considered by them, and rejected." Pl. Ex. 25

[85] Ms. McGrath-McKechnie testified that the OATH decisions occasioned no change in policy "I think—as I recall, we disagreed with OATH," she explained. McGrath-McKechnie 147. Referring to those same rulings, Mr. Daus testified, "Those were recommended decisions. They were not decisions as you would quote them in administrative law." Daus 115.

[86] Stephen Louis, the chief of the Legal Counsel Division of the Corporation Counsel, who was the point man on Operation Refusal, testified he could not recall learning about the OATH decisions and he could not recall being asked about them. Louis 35-36. Nor are there any memoranda from or to the Corporation Counsel on the subject.

[87] Asked whether he informed the TLC ALJs of the OATH judges' decisions, Mr. Daus said, "Not that I remember." Daus 242. Mr. McKay testified that he could not recall receiving copies of the OATH decisions from the legal department, and that it would have been the legal department's responsibility to bring such decisions to his attention. McKay 92-96. TLC ALJ Fioramonti testified he could not recall receiving any OATH decisions. Fioramonti 35-36. TLC ALJ Best testified that he had received no such decisions. Best 108.

[88] Mr. Best said he did not know if there was an Administrative Code provision dealing with service refusals. Best 98. Mr. Fioramonti, for his part, testified (at 40-41):

> A. … I've never seen a 19-507 violation from a TLC inspector. If it's a refusal violation it is written up as 2-50(b).
> Q. So as you sit here today, you are not aware of the fact that there is an Administrative Code section on refusals?
> MS. BIBERMAN: Objection.
> A. No. I mean you just told me, but I haven't read it.

As the TLC chairwoman "disagreed with OATH," the TLC determined that its judges should not even be bothered with knowledge of the decisions. Thus the TLC kept its own judges in the dark about rulings that were directly relevant to the very cases they were being asked to decide. Astounding as this practice may be, it was not an aberration. The policy would be repeated with regard to this Court's decisions. (*See* below at 27-29)

In blithe disregard for the OATH court, and for the Administrative Code, the TLC proceeded to direct its own judges to decide the refusal cases differently. They did so not by amending a law or by passing a rule, but through an unpublished, unannounced "policy." This policy was disseminated through another *ex parte* communication: the Rana Memo.

I. The Rana Memo "Policy"; 100% Conformity:

The Rana Memo, dated February 18, 2000, was not the first memo to the TLC judges regarding Operation Refusal. It was the last in a series. On November 18, 1999, Mr. McKay, the adjudications director, flagged the TLC Rule 2-50(b) cases, sending a memo to his judges that they must give one copy of any disposition to a TLC supervisor.[89] One month later, on December 16, 1999, Joseph Eckstein, the assistant chief ALJ (now a deputy commissioner), wrote a memo to all adjudications employees: "**ALL** 2-50(b) summonses are to be marked OAD [adjourned at the agency's request] and referred to a supervisor. **All** 2-50(b) summonses are being handled at 40 Rector Street [TLC headquarters] via the legal department. There are no exceptions!" (emphasis in original).[90] The third memo, dated January 3, 2000, came from Mr. McKay. It was to all ALJs and with a copy to Mr. Daus, among others. The third memo updated the previous memos: "Effective immediately all

[89] PX 26. Mr. McKay testified he could not recall why he issued this directive. McKay 215-216.

[90] PX 27.

Rule 2-50 summonses that were issued prior to November 12, 1999 will be checked with the legal department to see if they should be OAD'd or if the hearing should go forward as scheduled."[91] Asked why he sent this memo, referring to the dates Operation Refusal was put into effect, Mr. McKay said he wouldn't "speculate."

The Rana Memo to the TLC ALJs came after the OATH judges wrote their first decisions stating that the TLC's penalty scheme was unlawful. It stated: "The 'Operation Refusal' summonses are now being scheduled for hearings on the merits. In these cases, the Inspectors and/or Police Officers have been issuing Rule 2-50B summonses together with Rule 2-61A2 summonses." The memo then instructed the judges how to decide the cases. "Please be advised that, upon a finding of a refusal, the Commission's policy *requires* that both the Rule 2-50B **and** Rule 2-61A2 violations be sustained. Furthermore, where the Commission is seeking revocation in an Operation Refusal case, if the ALJ does find a violation of Rule 2-50B and Rule 2-61A2, the ALJ *must* submit to the Chairperson a recommended decision for the Rule 2-61A2 violation" (italics added).[92]

This policy was never announced to the public; there was no notice or comment; there was no industry notice. Defendants have recently so stipulated.[93] But Ms. McGrath-McKechnie spoke falsely about this fact, including under oath. First, in a letter to taxi driver Yourish, she justified his revocation in part by saying that the Operation Refusal initiative was widely publicized, including by Industry Notice.[94] The *Yourish* case was especially significant since it resulted in a decision by TLC ALJ Bonina (later promoted to chief ALJ)

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[91] PX 28.

[92] PX 29.

[93] Letter stipulation at PX 15.

[94] PX 30; Daus 453.

which Diane McGrath-McKechnie sent to Rose Rubin, the chief judge of OATH, in which she argued the OATH judges should reconsider. Then, at her deposition, Ms. McGrath-McKechnie testified that the policy was made public, "Via probably press release, probably industry notice." She added that anything that was unclear "was made more clear in other industry notices."[95] Since that testimony, defendants have stipulated that there was no press release, either.[96] There was, however, a press conference *where no one stated or even implied* that a taxi driver could have his license revoked for a first or second service refusal offense.

Chief ALJ Rana testified she did not know who determined that the policy she stated in her memo was "the Commission's policy." She did say the policy was communicated to her by Matthew Daus. Asked whether that policy was enacted pursuant to CAPA, Rana—who was chief ALJ and was promoted to chief of staff, testified, "I don't know what CAPA is." [97]

Despite the lack of legal basis, despite the absence of notice, the TLC judges enforced the Rana Memo policy without fail. In each case where the accused taxi driver was found guilty of a service refusal, he was also found guilty of TLC Rule 2-61A—an act against the best interest of the public.

Not only was the fact-finding corrupted, for a Rule 2-61A allegation, no fact finding was even necessary. Per the Rana Memo, a TLC Rule 2-50B violation meant—automatically and without question—a TLC Rule 2-61 violation as well. Ms. Rana, Mr. Eckstein, Mr. Fioramonti, and Mr. Daus all admitted that no facts whatsoever were needed to find a cabbie

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[95] McGrath-McKechnie 152-153.

[96] Letter Stipulation at PX 15.

[97] Rana 91-92.

guilty of TLC Rule 2-61.[98] Only the chairwoman equivocated. Asked the same question, she said, "I don't recall at this time."[99]

But the TLC judges all knew that the game was rigged. As Ms. Rana herself said: "The 2-50(B) service refusal was the violation that was considered to be the violation in the best interest of the public."[100] Mr. Daus made it clear that the conclusion came first, and the analysis followed. He testified:

> The facts themselves in accordance with McKechnie's policy, Commissioner McKechnie's policy, the fact of finding a refusal, also leads to a finding of fact that it's actions against the best interest of the public, *because Commissioner McKechnie declared all refusals to be actions against the best interest of the public. They go hand in hand.*
>
> Q. Based on her declaration?
>
> A. *Based on her policy decision, yes, which led to an interpretation of the rules.*[101]

Not a single ALJ objected to or defied this policy, which had just been found illegal by the OATH judges who were not TLC per-diem employees.[102] Not one considered the Administrative Code, the governing law. They simply applied the Rana Memo, as directed. As far as Daus could recall, just one TLC judge even made an effort to explain why Operation Refusal was lawful. That was TLC ALJ Bonina, who was promoted to Chief ALJ when Ms. Rana was named chief-of-staff.[103]

Not only was the result pre-ordained, so too were the words of explanation. The language of the Rana Memo found its way into every Operation Refusal decision where the

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[98] Rana 208-209; Eckstein 204, Fioramonti 49-50, Daus 295.

[99] McGrath-McKechnie 268-269

[100] Rana 209

[101] Daus 295 (emphasis added).

[102] Daus 265-266.

[103] Daus 306-307.

driver was found to have refused. Thus in his first Operation Refusal case, TLC ALJ Best wrote: "It is the policy of the TLC that a finding of a passenger service refusal is sufficient to establish that the Respondent acted against the best interest of the public resulting in a violation of Rule 2-61(a)(2). Therefore, inasmuch as I find Respondent in violation of Rule 2-50(b), I also find that he is guilty of a violation of Rule 2-61(a)(2)."[104] In his first Operation Refusal decision, TLC ALJ Fioramonti said the same thing, word-for-word.[105]

The same exact language was employed by TLC ALJ Randi Elliott, when she convicted plaintiff John Padberg and recommended his revocation.[106] It was employed in every other decision, too.[107] Mr. Daus admitted this language was "boilerplate," but he defended its use "for efficiency purposes."[108]

At the so-called summary suspension hearings, TLC ALJs applied a rubber stamp. In the rare cases they did not, the chairwoman moved in. Early on, on one or two occasions, the ALJ did reject the suspension. On November 29, 1999, TLC ALJ Fioramonti held that the suspension of taxi driver Ernest Mercy, whose license had been seized 13 days earlier, should not be continued. "In short, based on the evidence submitted at this hearing, I do not find that sufficient evidence exists to establish that respondent poses a risk to the public's welfare, and recommend that respondent's suspension be lifted pending final resolution of the charges against him."[109]

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[104] Hearing of Dominic Tutu, Feb. 23, 2000, PX 31.

[105] Hearing of Mohamed Hafiz, May 3, 2000, PX 31.

[106] Hearing of John Padberg, March 23, 2000. PX 33. It was Mr. Padberg's bad luck to draw Ms. Elliot as his judge. Though she decided relatively few Operation Refusal cases, she, like Mr. Best, convicted the driver every time and recommended revocation every time. Plaintiffs' Analysis PX 13.

[107] Analysis PX 13.

[108] Daus 299.

[109] Summary Suspension of Ernest Mercy, PX 32.

The chairwoman, however, quickly rejected ALJ Fioramonti's recommendation and ordered Mr. Mercy's suspension be continued. Mr. Mercy's license was suspended until April 6, 2000—nearly six months.[110] Mr. Fioramonti would never rule the same way again.[111] The other TLC judges in summary suspension hearings unfailingly ruled that suspensions should be continued.[112] The summary suspension hearings—where the unconstitutional suspension policy was perpetuated—remained shams. As a result, summary suspensions could last weeks or months. Indeed, the average suspension lasted 62 days.[113]

J. The TLC Defies This Court:

On August 14, 2000, this Court ruled on plaintiffs' motion for a preliminary injunction. While the Court denied the injunction—on the grounds that the plaintiffs had already received a hearing on the merits—it left no doubt that the TLC's so-called summary suspension policy was unconstitutional. The Court stated, *inter alia*, "Like the other two *Mathews* factors, the third—the government's interest, together with the administrative burden of additional procedural safeguards—also contributes to this Court's view that Padberg was entitled to pre-seizure notice and an opportunity to be heard." The Court added, "[A]n assessment of TLC's interest in the use of summary suspensions to carry out its goal of ending racially-motivated service refusals leads to the conclusion that no 'exigent' or 'extraordinary' circumstances exist in this case to warrant relaxing due process protections." The Court concluded, "For all of the above reasons, this Court finds that Padberg has indeed

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[110] Hearing of Ernest J. Mercy, PX 32.

[111] Mr. Fioramonti said he could not recall any other case where he recommended the suspension be lifted. Fioramonti 86. The TLC has produced just one other such decision out of more than 500.

[112] On information and belief, there was one other instance where a TLC ALJ recommended that a suspension be lifted pending a hearing on the merits. Diane McGrath-McKechnie reversed that judge's recommendation as well.

[113] This figure is based on data listing the drivers and their suspension days provided by the TLC.

shown a likelihood of success on his § 1983 claim of deprivation of property without due process." Of course, this Court would later rule finally that the summary suspensions were unconstitutional.[114] For nearly two years, the TLC waved off this admonition.

This Court did not condemn the revocation policy. But its ruling was caused by the TLC's deceptive claim that the policy was necessary "to combat racial bias among taxicab drivers." Discovery has demonstrated that this allegedly compelling interest was not what the TLC had in mind at all. The vast majority—more than 85%—of Operation Refusal cases were based on destination refusals or hotel hack line refusals or other factors that had nothing whatsoever to do with race. Indeed, even before they started, in early November 1999, TLC spokesman Alan Fromberg told the Daily News that 85% of refusals were destination-based.[115] Mr. Daus had no specific data. But he admitted that it was common knowledge—even before Operation Refusal was decreed—that most refusals were destination refusals and not based on racial bias. He testified:

> Q. Did you communicate that trend to Diane McGrath-McKechnie that more than half of service refusals were destination based?
>
> A. I don't remember.
>
> Q. Did she communicate that to you?
>
> A. I believe it was generally known and understood at the time that we were looking at the operation.
>
> Q. It was generally known and understood within the TLC that more than half of service refusals were destination based?
>
> A. That was my understanding.[116]

The TLC judges drew no distinction whatsoever between bias refusals and destination refusals. They applied the same penalties to each. TLC ALJ Best testified, "A refusal is a

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[114] 203 F. Supp. 2d at 277-282.

[115] The Daily News article is dated Nov. 4, 1999. PX 37..

[116] Daus 418.

refusal." Race-based refusals were no different from any other.[117] *Thus, the entire asserted basis for the policy was fraudulent. The TLC played the race card to defend its lawless actions.*

As to the summary suspensions, this Court's ruling did not cause the TLC to re-think. Why not? Diane McGrath-McKechnie testified she discussed the decision with her own counsel and the Corporation Counsel and, "We all concurred that we thought that we would prevail."[118] Mr. Daus says he can recall a discussion, "[B]ut I don't recall a specific recommendation that they made."[119] He does recall advising the chairwoman "that Judge Dearie's discussion and the decision did not necessarily order us to stop the suspensions."[120] Stephen Louis, the Corporation Counsel lawyer involved, could not recall any discussion with the TLC on the matter.[121] There was nothing in writing.

Mr. McKay, the chief of adjudications, testified he could not recall receiving the decision.[122] No one distributed it to the TLC ALJs.[123] Thus, the TLC judges proceeded as if this Court's decision had never been issued. In the so-called summary suspension hearings, the TLC judges almost without exception ruled that taxi drivers suspended on the street should have their suspensions continued. This conformity was essentially complete, even after this Court ruled. Neither Mr. Daus nor Ms. McGrath-McKechnie could recall a single

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[117] Best 140; TLC ALJs Fioramonti (135-136) and Rosinger (112-113) testified to the same effect. Now that the truth has emerged, this Court should revisit it earlier summary judgment ruling as it was based on the TLC's "compelling interest" in fighting racism. To assert these facts, plaintiffs have moved to amend their complaint.

[118] McGrath-McKechnie 175.

[119] Daus 39-40.

[120] Daus 233.

[121] Louis 37-38.

[122] McKay 127-128.

[123] Daus 243; Rana 255-256.

instance—out of more than 500 suspensions—where the TLC judge failed to continue the suspension based solely on the charge of a TLC inspector.[124]

K. Judges, But Not Law Judges; No Comment on the Constitution:

That the TLC judges ruled in lock-step on both the first-strike revocation policy and the unconstitutional summary suspension policy is a scandal. But it may be explained by the TLC's view of judging in general. TLC judges admitted that they have no role in interpreting the law or even in enforcing the United States Constitution.

Asked how a judge should rule when a TLC policy conflicts with a TLC regulation, TLC ALJ Best said, "I've never had that problem."[125] TLC ALJ Fioramonti was asked if he believed the revocation policy was lawful. He replied, "I never had that conversation with myself."[126] He added that whatever policy was set forth in the memorandum, he would apply it.[127] Another TLC Judge, Cecelia Rosinger, also among the highest paid, was asked what she would do "if in [her] view a rule conflicts with a policy?" Her response: "It is not for me to interpret the rule." She added, "I follow rules, regulations and policy of the commission, period," and stated, "If the commission determines that its rule is interpreted in a particular way, I have no problem with following that policy."[128] Asked what a judge should do when a TLC policy conflicts with the City Administrative Code, former Chief Judge Rana wondered, "I don't know exactly what you mean by 'conflict.'" She allowed further that she

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[124] McGrath-McKechnie 179-180; Daus 124.

[125] Best 109.

[126] Fioramonti 53-54.

[127] Fioramonti 54-55.

[128] Rosinger 67-70.

could not recall such a situation "so I can't really say what they would do."[129] Ms. McGrath-McKechnie, asked what a judge should do, testified, "I don't recall at this time."[130]

Whether the United States Constitution applied in TLC Courts was, for these judges, an open question. ALJ Fioramonti testified, "I don't know. Probably."[131] ALJ Best said, "I guess so."[132] ALJ Rosinger testified, "I didn't see it within my purview to consider constitutional issues in administrative hearings." Chief Judge Rana ultimately agreed with Ms. Rosinger,[133] but the question itself was perplexing. Her testimony:

> Q. Did the U.S. constitution apply in TLC courts?
>
> MR. HOROWITZ: Objection to the form of the question.
>
> A. I don't know what you mean, did it apply.
>
> Q. You don't know what I mean?
>
> A. No, I don't. What do you mean?
>
> Q. Did the law as stated in the U.S. constitution, did that govern in TLC courts?
>
> MR. HOROWITZ: Objection to the form of the question.
>
> A. I'm not exactly sure what you're asking. I'm sorry.[134]

Thus, the TLC judges, in Operation Refusal cases and otherwise, totally abdicated their obligation to interpret the law, and even the Constitution. Instead, they took policies dictated *ex parte* as sacrosanct, not pausing to ask if those policies are legal.

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[129] Rana 158-160.

[130] McGrath-McKechnie 223-224.

[131] Fioramonti 59.

[132] Best 84.

[133] Ms. Rana testified: "As Administrative Law Judge it is not within the scope of my authority to make a constitutional determination." Rana 133.

[134] Rana 131-132.

L. Appellate Judge Diane McGrath-McKechnie:

If a taxi driver did not like a TLC ALJ's ruling, he could appeal. Normally, appeals would be to appellate ALJs. But, in Operation Refusal cases, the appeal process was different.[135] Once a TLC ALJ made his or her "recommendation" to the chair, the chairwoman would decide whether to accept, modify or reject. Assuming that the chairwoman accepted the recommendation, a driver could seek review. But this time the chair herself was the appellate judge, effectively ruling on her own decisions in cases argued by TLC lawyers working for her general counsel. It's no wonder that she *never* reversed a revocation.

A driver could appeal a second time to the full TLC commission. But when the full commission considered an appeal, it would do so in "executive session." Before, appeals had been heard at a public hearing. Under the new rules, a taxi driver would need five votes to reverse the chairwoman, whereas on the first appeal the chairwoman decided alone.[136]

Thus, at the end of the day, the TLC tribunal operated as follows: TLC executives wrote the rules, employed the prosecutors, hired and fired the judges, and decided the appeals. This is the system that defendants now claim was without bias.

Facts Relating to Punitive Damages:

In support of their claims for qualified immunity and in opposition to punitive damages, defendants make three factual claims: (1) They *did not know* that they were supposed to afford taxi drivers a hearing before stripping their licenses; (2) Ms. McGrath-

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[135] Daus 436-439. The appeal process was different when OATH judges heard the cases. At that time, the appeals were directly to the full TLC commission. Mr. Daus termed the change "an extra level of due process." Daus 438.

[136] Under the prior system, appeals from OATH would go directly to the full commission, which would meet in public, and the commission would need five votes to affirm a penalty. Daus 436-437.

McKechnie *had reason to think* that she had such authority; (3) Ms. McGrath-McKechnie and Mr. Daus spoke to lawyers.[137] Factually, these claims are nonsense. Legally, they would raise a jury question (at best) if there was a foundation in the record. In fact, there is no foundation and the record unequivocally demonstrates defendants' callous and reckless disregard for the rights of the plaintiff class.

M. A Rush to Press Conference:

As an initial matter, defendants' action was extremely rushed. The famous actor Danny Glover appeared at TLC offices on Nov. 3, 1999. At the time, Ms. McGrath-McKechnie was out of the country—she could not say exactly when she returned.[138] Though service refusals were a long-standing concern, dating back at least to the Koch administration,[139] the Giuliani administration had a new plan, which they announced by November 10.

Before the press conference, Mr. Louis recommended they "downplay" the idea of invoking the state Civil Rights law as a charge against taxi drivers "given the lack of case law."[140] But at the press conference itself, the mayor raised the idea prominently: "So, yes, this could also be a crime," he told reporters. "[T]hat would lead to a complete seizure of [the taxicab]," though he added, "We're still researching that part of the law."[141] Ms. McGrath-McKechnie refused to concede they were acting in a hurry. She did admit that Mr. Glover kickstarted the action, and that they moved to respond to the movie star within a

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[137] *See* Defendants' brief pp. 15-20. Of course, none of this applies to Mr. Giuliani, who, the evidence indicates, ordered the chairwoman to act in the first place.

[138] McGrath-McKechnie 43-44.

[139] Daus 44-45.

[140] Memorandum from Stephen Louis to Jeffrey Friedlander, Esq., et al., dated Nov. 9, 1999, PX 34.

[141] PX 21, p.6. The research would never support any such charge, as Mr. Louis had advised already.

week: "[I]t went from opportunity strikes, it went from the back burner to the front burner," she testified.[142]

N. Defendants' Guilty Knowledge:

Defendants' claim that a taxi driver's right to his license was not clearly established because "there are times when procedural due process does not require a pre-deprivation hearing."[143] The general rule, of course, is to the contrary. As this Court stated: "Procedural due process generally requires that an individual be given notice and an opportunity to be heard before the government may deprive him of property." 203 F. Supp. 2d at 277, citing *Fuentes v. Shevin*, 407 U.S. 67, 82, 92 S. Ct. 1983, 32 L. Ed 2d 556 (1972). In determining whether the general rule applied, this Court applied *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), a Supreme Court case decided a generation ago which is familiar to every first year law student. Thus, plaintiffs' right to hearings was entrenched decades before defendants acted.

Moreover, there is no evidence that defendants even considered the constitutionality of their actions. Mr. Daus wrote two brief memos.[144] Defendants do not cite them as "advice of counsel." It's no wonder as neither is substantive and neither discusses the legality or the constitutionality of the summary suspensions. At his press conference, Mr. Giuliani announced he was entitled to act. He said Operation Refusal was comparable to drunk driver cases.[145] But the Daus memos mention nothing about such cases. Ms. McGrath-McKechnie

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[142] McGrath-McKechnie 65-66.

[143] Defendants' Brief, p.16.

[144] PX 35 and PX 36.

[145] PX 21, p.3.

could recall no discussion relating to the topic.[146] Mr. Louis said he did advise Mr. Daus. But he did not recall doing any legal research or asking anyone else to do so.[147]

Even if defendants' protestations of ignorance were at all plausible, they would have soon learned the law when this Court decided the preliminary injunction motion. In that decision, this Court stated the law that it would later confirm on summary judgment.[148] Ms. McGrath-McKechnie said she huddled again with her lawyers following that decision. But Louis recalls nothing of it. Again, there is nothing in writing, no proof that the law or plaintiffs rights were ever considered.

Indeed, Ms. McGrath-McKechnie's contempt for legal norms was revealed at an open meeting of the TLC held in July of 2000. At that meeting, several TLC commissioners expressed doubt about the legality of the revocations. She was unreceptive. "[W]e have gone through this *ad nauseam* with Corp Counsel, that we are in our authority to revoke," she complained as she attempted to ram her prosecutorial agenda home.[149] This statement drew a protest from TLC Commissioner Alberto Torres, who put it on record that she was not speaking for the TLC.[150] Mr. Torres also testified that the TLC commissioners never received any legal advice from the Corporation Counsel.[151] Nor were the commissioners consulted on the legality of the policy.[152] Nor were they permitted to vote on it.[153]

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[146] McGrath-McKechnie 359.

[147] Louis 13.

[148] *See* § J, pp. 28-31, above.

[149] Torres 32; Daus 314 ("That sounds like Commissioner McKechnie, something she would say.")

[150] Torres 32-33.

[151] Torres 33.

[152] Torres 16.

[153] Daus 445-446.

Mr. Daus, for his part, testified that "[his] role was to represent the Chairperson first and foremost." One might think that the general counsel's client was the Commission. But Daus believed differently. He testified: "My duty of loyalty, in my view, is to my client, which is Diane McKechnie."[154]

The quality of Mr. Daus's advice is further illustrated by the fact that months after the chairwoman issued her decree, TLC lawyers were still seeking some legal basis. Indeed, on February 3, 2000, Idelcy Lando, a TLC attorney (and former judge) delivered a memo to Mr. Daus. She stated: "I would not cite the legislative history in our arguments or legal briefs before OATH because the final version [of the service refusal law] is less strict [than] the penalties originally proposed." She goes on to propose other creative readings of the rules, and suggests enforcement against taxi owners, as well as drivers, an idea that the TLC lawyers had bandied about, but never attempted.[155]

At the July 2000 meeting, the commissioners upheld the OATH judges despite the arguments of TLC prosecutors, and the loud protests of the chairwoman. Ms. McGrath-McKechnie, by her own admission at the meeting, was not "upset," but she was "disappointed." Mr. Torres thought she was indeed upset.[156]

In short, whatever Ms. McGrath-McKechnie and Mr. Daus thought initially, the OATH judges, fellow TLC commissioners, and this Court soon put them on notice that their

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[154] Daus 312. Daus also testified that Diane McGrath-McKechnie hired him first at the Community Development Agency, then as "special counsel" for the TLC, a position that she created just for him, then as the agency's general counsel. Daus 312-313. A jury could easily conclude that, given his admission of loyalty, his advice and objectivity were hopelessly compromised.

[155] PX 40. Mr. Daus himself had mentioned the idea of penalizing owners in his November 1999 memos. He volunteered, "I don't know why" they never did it. Daus 145. Ms. McGrath-McKechnie did not recall what they did regarding taxi owners. McGrath-McKechnie 317.

[156] Torres 61.

actions were illegal and unconstitutional. This knowledge did not affect their actions one iota. They kept on going, keeping the TLC judges in the dark as well.

O. No Real Advice Of Counsel:

Defendants would have this Court swallow whole Ms. McGrath-McKechnie's advice of counsel defense, granting her summary judgment, despite the fact that she proved an evasive and forgetful witness throughout. For example, at her initial deposition, she testified "I don't recall" 266 times. Among the items that slipped her mind was what she said at the press conference announcing (albeit deceptively) Operation Refusal to the public. Indeed, she could not recall whether she said anything at all.

She could not recall who in the Corporation Counsel's office advised her, though she allowed that Mr. Louis "may have been" involved.[157] As to the substance of that advice, she testified: "I don't recall them giving specific advice to me. I mean—about Operation Refusal."[158] She says the Corporation Counsel "signed off" on everything. But literally speaking, the City lawyers signed nothing, putting no advice in writing.[159]

As for Stephen Louis, the dispenser of the alleged legal advice, his testimony was perhaps even hazier. He could not recall whether he advised on Operation Refusal before it was announced—or after.[160] His memory of his discussion with Mr. Daus: "Well, that they had a proposed policy, and we reviewed it and discussed it," adding, "I don't recall the details."[161] He could not recall where the conversation took place, whether it was in person

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[157] McGrath-McKechnie 195-196.

[158] McGrath-McKechnie 198.

[159] Louis 11-12.

[160] Louis 14.

[161] *Id.*

or on the telephone, or for how long they spoke.[162] He said he was under the impression that Operation Refusal was designed to combat racial bias.[163] In fact, the TLC issued far more summonses for destination refusals.

He did not recall if he was asked whether it was lawful for the TLC to revoke a taxi driver's license for a first service refusal offense.[164] He did not recall doing any research or reviewing the legislative history.[165] He does not recall discussing this Court's August 2000 ruling with anyone.[166] Asked whether he had adequate knowledge of the facts to give legal advice, Mr. Louis testified, "I guess I don't know if I had."[167] He did not recall speaking with Ms. McGrath-McKechnie at all. [168]

ARGUMENT

I. Where a Judge Has a Financial Interest in the Outcome of His Cases, the Proceedings Cannot Satisfy Due Process

The Supreme Court has held that due process requires a "fair trial in a fair tribunal." *Withrow v. Larkin*, 421 U.S. 35, 46, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975) (quoting *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942 (1955)). "[A]dministrative agencies which adjudicate" are bound by this rule as well as courts. *Id.* A biased decision-maker renders the proceeding unconstitutional. *Id.* at 47. Of course, there is a presumption of honesty and integrity. *Withrow*, 421 U.S. at 46. There are, however, a few situations, such

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[162] Louis 15, 54-54.

[163] Louis 17.

[164] Louis 19.

[165] Louis 12, 36.

[166] Louis 38.

[167] Louis 84.

[168] Louis 20.

as when the adjudicator has a pecuniary interest in the outcome of the case, where the Supreme Court has recognized that the risk of bias is strong enough that the proceedings will not satisfy due process. *See id*. (collecting cases).

To be sure, the law does not prevent an administrative law judge from being employed by the prosecuting agency.[169] Nor is there any question that ALJs must follow the duly enacted rules and regulations of their agency.[170] All judges, including ALJs, must follow the law. But the law does not require an ALJ—or any judge—to follow so-called policy dictates that are not law or that conflict with statutes and regulations.[171] Administrative law judges are judges, not stenographers, and our entire legal tradition, starting with the Declaration of Independence, demands they be allowed to decide cases fairly and without the possibility of retribution from the prosecuting authority. That TLC judges may be fired or have their hours reduced willy-nilly is inconsistent with due process.

The Supreme Court's cases do not require proof of an outright bribe or payment in exchange for a particular decision. The financial interest can be less direct. Thus in *Tumey v. Ohio*, 272 U.S. 510 (1927), the Court held unconstitutional a scheme where prosecuting attorneys and police officials were paid a percentage of the fines imposed in the cases they

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[169] *See, e.g., Donato v. Plainview-Old Bethpage Cent. Sch. Dist.*, 985 F. Supp. 316, 319 (E.D.N.Y. 1997).

[170] *See, e.g., Stieberger v. Heckler*, 615 F. Supp. 1315, 1387 (S.D.N.Y 1985), and *Assoc. of Administrative Law Judges, Inc. v. Heckler*, 594 F. Supp. 1132, 1141 (D.D.C. 1984), which the plaintiffs cite. These cases state that an ALJ must follow the law, including law established by their agency. They do *not* say an ALJ must enforce an unlawful policy.

[171] From time to time, large federal agencies have instituted policies of "nonacquiescence," where an agency announces it will not follow the case law of certain circuits because doing so would create an inconsistency in the treatment of citizens depending on where in the nation they happen to live. This practice is controversial, but has been defended on the grounds that an agency should apply a uniform national rule. In creating such a policy, the agency openly acknowledges what it is doing and then seeks clarification of the law from the Supreme Court. It does not simply hide the law from its judges or arbitrarily refuse to follow case law. *See Schisler v. Heckler*, 787 F.2d 76, 82 (2d Cir 1986) (criticizing an agency for alleged nonacquiescence); *Stieberger*, 615 F. Supp. at 1353 (condemning nonacquiescence).

prosecuted, and where the town mayor, who served as judge, was paid out of court costs imposed on defendants found guilty.

In *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), the Court held that it violated Due Process for a town mayor to act as judge "in cases of ordinance violations and certain traffic offenses" where the town derived a substantial portion of its revenues from the traffic court. In *Gibson v. Berryhill*, 411 U.S. 564 (1973), the Court held that a state optometry board "composed solely of optometrists in private practice for their own account" could not sit as judges in cases where licensed optometrists were charged with violating state law by working as employees for a corporation. The Court ruled that the board "was so biased by prejudgment and pecuniary interest that it could not constitutionally conduct hearings looking toward the revocation of appellees' licenses to practice optometry." *Id*. at 578. In *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), the Court held that it violated due process for an appellate judge to decide a case where he was also a plaintiff in a pending action concerning the same legal issue. Here, the temptation comes from the fact that a TLC ALJ judge could lose his job—and would have no legal recourse—if he ruled contrary to the wishes of the TLC executives. Both *Ward* and *Aetna* involve far less direct forms of financial interest than applies to the TLC judges.

The Supreme Court's cases also do not require proof that the adjudicator actually succumbed to temptation. "[T]he requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice." *Tumey*, 273 U.S. at 532. Some judges might rule dispassionately despite their interest. Still, the *Aetna* Court explained the age-old idea:

> More than 30 years ago Justice Black, speaking for the Court, reached a similar conclusion and recognized that under the Due Process Clause no judge 'can be a judge in his own case [or be] permitted to try cases where

> he has an interest in the outcome.' *In re Murchison*, 349 U.S. 133, 136 (1955). He went on to acknowledge that what degree or kind of interest is sufficient to disqualify a judge from sitting 'cannot be defined with precision.' *Ibid*. Nonetheless, a reasonable formulation of the issue is whether the 'situation is one "which would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true."' *Ward v. Village of Monroeville, supra*, at 60.

475 U.S. 813 at 822. In such a circumstance—where there would be a temptation to the average judge "not to hold the balance nice, clear and true"—the judge's ruling cannot stand. Here, of course, every TLC ALJ upheld the unconstitutional suspensions and ruled in accordance with TLC policy. They did not cite the Administrative Code or even review TLC rules. The possibility of termination ever-present, they simply followed "TLC policy" as expressed to them in the Rana Memo.

II. A Tribunal Where ALJs Are Untenured At-Will Employees of an Administrative Agency Does Not Satisfy Due Process

The idea that a judge should not be beholden to the executive was expressed in this nation's founding document, the Declaration of Independence. Among the colonists' grievances against King George was: "HE has made Judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries." This provision has been cited repeatedly by the Supreme Court, as has the idea it embodies.

For example, in *Weiss v. United States*, 510 U.S. 163, 178 (1994), a case involving military courts, Justice Rehnquist stated plainly, "[A] fixed term of office is a traditional component of the Anglo-American civilian judicial system," even if it was not required in courts martial. Concurring in the same case, Justice Scalia, citing the Declaration, went further: "I am confident that we would not be satisfied with mere formal prohibitions in the

civilian context, but would hold that due process demands the *structural* protection of tenure in office, which has been provided in England since 1700." 510 U.S. at 197.[172]

In *U.S. v. Hatter*, 532 U.S. 557, 567-68 (2001), Justice Breyer explained the importance of tenure (life tenure for federal judges) and guaranteed income as twin bulwarks of judicial independence. The court cited Alexander Hamilton's dictum "that '*a power over a man's subsistence amounts to a power over his will.*' The Federalist No. 79, at 472. For this reason, he observed, 'next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support.'" *Ibid.* While no one expects that all the same protections that apply to federal judges should apply to administrative law judges, they are bound, as this Court noted earlier, by Due Process and the right to a fair trial. It is, therefore, untenable for even ALJs to have no fixed term, no guaranteed income and no civil service or contractual protections.[173]

The California Supreme Court recently considered a closely parallel situation where a local government hired a hearing officer per-diem. In *Haas v. County of San Bernardino*, 27 Cal 4th 1017, 45 P.3d 280 (California Supreme Court 2002), a massage clinic received a notice of revocation when one of its employees was accused of proposing a sexual act to an undercover police officer. The matter was set for a hearing and the county proposed hiring a local attorney as the hearing officer. Haas, the massage parlor owner, objected on the ground that the county hiring its own hearing officer would create an actual conflict of interest and/or potential conflict of interest in violation of the Due Process Clauses of the Federal and

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[172] While the *Weiss* Court held that military courts did not require a separate body of tenured judges, the army officers who acted as judges did enjoy the ordinary employment protections afforded officers. They were also insulated from pressures from superiors within the chain of command, both of which permitted the judges independence. 510 U.S. at 179-180.

[173] See § A, pp. 5-6, above.

State Constitutions. He argued that the problem was not merely that the hearing officer might be swayed in the first case, but that the attorney might be hired for *other* hearings "in the future if she's interested in doing it and if the case should arise." 45 P.3d at 284.

The California Supreme Court agreed and held that the arrangement violated due process. The court held:

> While the rules governing the disqualification of administrative hearing officers are in some respects more flexible than those governing judges, the rules are not more flexible on the subject of financial interest. Applying those rules, courts have consistently recognized that a judge has a disqualifying financial interest when plaintiffs and prosecutors are free to choose their judge and the judge's income from judging depends on the number of cases handled. No persuasive reason exists to treat administrative hearing officers differently.

45 P. 3d at 285-86 (footnotes omitted). The *Haas* court relied on the same federal cases this Court cited in its 2002 Ruling, specifically *Withrow*, *Gibson*, and *Murchison*, as well as *Tumey v. Ohio* and *Aetna Life Insurance Co. v. Lavoie*. In words that apply perfectly to the TLC, the court concluded:

> Here . . . the prosecuting authority may select its adjudicator at will, the only formal restriction here being that the person selected must have been licensed to practice law. . . . Here, as there, while the adjudicator's pay is not formally dependent on the outcome of the litigation, his or her future income as an adjudicator is entirely dependent on the goodwill of a prosecuting agency that is free to select its adjudicators and that must, therefore, be presumed to favor its own rational self-interest by preferring those who tend to issue favorable rulings.

45 P. 3d at 289 (citations and footnotes omitted).

Defendants say Haas has "absolutely nothing" in common with this case.[174] Of course, it does, but the instant situation is far worse. Unlike the judge in Haas, who may or

[174] Def. Brief p. 13.

may not have applied for additional assignments, TLC judge are regular, if per-diem employees. Thus they come to depend on regular income from the agency, which can be readily taken away. They are also continually subject to *ex parte* contacts and supervision of all sorts by the chief judge and the adjudications executives.

Even the so-called appeal process violated Due Process. TLC procedure in Operation Refusal cases required the driver to appeal first to the chairwoman. Thus, she sat in judgment of the results of her own policy and prosecutions she (and later Mr. Daus) initiated. A similar set-up was held unconstitutional in *In the Matter of General Motors Corp.- Delco Products Div. v. Rosa*, 82 N.Y.2d 183, 604 N.Y.S.2d 14 (1993). In that case, a company had been found guilty of discriminating against an employee by the state Division of Human Rights. During the pendency of the case, the Division's general counsel, who supervised prosecutions, was promoted to commissioner. As commissioner, she ruled on the company's appeal. The court held that having the same person act as prosecutor and appeals judge was unconstitutional. Indeed, the Division did "not seriously question" what was "at least an appearance of unfairness." 82 N.Y.2d at 188.

In this case, we have another general counsel—who admitted his first loyalty was to the chairwoman herself—supervising the prosecutors. Next, he was promoted to chairman and became the judge in his own cause. These facts alone render the TLC tribunal unfair and unconstitutional.

Nor is there any reason that the TLC must rely on per-diem judges. With a large and regular caseload (100,000 summonses), the TLC could hire salaried employees and offer them civil service status or contractual protections. The contrast with federal practice is telling. Federal ALJs are exempt from performance evaluations by their agencies, 5 U.S.C. § 4301 (1988), and can be removed only for cause after a hearing before the Merit Systems

Protection Board (MSPB). *Id.* § 7521. They receive periodic step increases in pay without approval by their employing agency. *Id.* § 5335. Cases are assigned to ALJs on a rotating basis, as far as is practicable, so that agencies cannot influence the results by selecting the judge. 5 U.S.C. § 3105 (1988). ALJs are independent of investigative or prosecutorial personnel in the agency. *Id.* § 554(d). *See* James P. Timony,[175] *Performance Evaluation of Federal Administrative Law Judges*, 7 Admin. L.J. A.U. 629, 633-34 (1993); *see also Butz v. Economou*, 438 U.S. 478, 513-14 (1978) ("the process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency."); *Stieberger*, 615 F. Supp. at 1386 ("Although the APA does not provide [life tenure] the ALJ is more protected than other federal employees."). Even if not all of these protections were to apply, there must be structural protections in order for New York City taxi drivers to receive fair hearings and due process of law. The current system does not satisfy due process. Thus, none of the Operation Refusal convictions can stand.

III. Defendants Reckless and Persistent Disregard for Due Process Merits Punitive Damages As a Matter of Law

The Supreme Court has held: Punitive damages are available in § 1983 actions "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56 (1983). While normally punitive damages are a jury question, in this case, the undisputed facts establish reckless or callous indifference and even intent. Accordingly, summary judgment as to the right to punitive damages is appropriate, even if it

[175] Mr. Timony is Chief Administrative Law Judge of the Federal Trade Commission and has also heard cases for 16 other agencies.

is the province of the jury to establish, within reason, the amount. *Lee v. Edwards*, 101 F.3d 805, 808 (2d Cir. 1996).

Initially, when the defendants announced the Operation Refusal summary suspension policy, they did so despite the fact that the general rule is that due process requires that an individual be given notice and an opportunity to be heard before he may be deprived of his property. At the press conference, the former mayor's claim that cab seizures were "something that we're legally entitled" to do was based on a comparison with drunk driver cases. But drunk driving, as is well known, is a violent and physically dangerous act. It is therefore not surprising that there is no evidence in the record of any lawyer advising the mayor that refusing service was indeed comparable to driving drunk. Certainly, the TLC's own legal memos say nothing on this score. In any event, the policy to which the mayor alluded was itself unconstitutional. *Krimstock v. Kelly*, 306 F.3d 40 (2d Cir. 2002).

Indeed, there is no evidence that the defendants had any reason to believe that the general rule should not apply. Indeed, given the record, there is no reason to credit even their professions of belief. There is no evidence of what, if anything, the Corporation Counsel advised about the summary suspension policy. Mr. Louis could not recall, as he put it, "the details." Indeed, the one piece of advice he gave in writing—to downplay the Civil Rights law as a basis for charges—Mr. Giuliani ignored. The one brief memo from the Mayor's office strikes a cautionary note, asking to "clarify the 'expedited' procedures" available to taxi drivers following summary suspension.[176] But that advice was also ignored. In ruling on the preliminary injunction motion, this Court found:

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[176] This document is a Nov. 10, 1999 memorandum from Erik Sorensen, then chief of staff to the senior advisor to the mayor, to Ms. McGrath-McKechnie, Mr. Daus and others. PX 38. Defendants failed to produce it until

> The exact nature of these hearings, however, is the subject of some confusion. Section 8-16(b) of the TLC rules states that proceedings for license revocation 'shall be initiated within five (5) calendar days of the summary suspension.' These proceedings presumably include a full hearing on the merits before an ALJ, and finally determine whether a driver's license will be revoked. But Section 8-16(c) describes an alternative procedure, in which a taxicab driver can challenge the actual suspension, by requesting a hearing within five days of its occurrence. This 'summary suspension hearing' takes place within ten days of the driver's request, and is conducted by an ALJ instructed to consider 'relevant evidence and testimony under oath,' What the 'relevant evidence' consists of is not defined in this section, although at oral argument before the Court on June 29, 2000, counsel for TLC acknowledged that at a 'summary suspension hearing,' the ALJ does little more than check that the summons was issued properly, and review the taxicab driver's record for prior violations. . . . Like the nature of the hearings, the duration of the summary suspension is also unclear.[177]

In fact, the average "summary suspension," the record now shows, lasted not five days or 10 day, but 62 days. Defendants knew that, too, and did nothing.

Even if defendants were not aware that suspensions without hearings were unconstitutional, this Court found that they were, ruling in no uncertain terms. The undisputed evidence is that this ruling did not cause any reconsideration by the defendants. Ms. McGrath-McKechnie said only that "we thought that we would prevail," which, of course, they did not. She offers no basis for this "thought." She could not recall any legal analysis that was done. Mr. Daus, for his part, could recall nothing specific. Mr. Louis could not recall any discussion whatsoever. There is nothing in writing. Thus, there was no basis for the belief that the suspensions were lawful.

Nov. 15, 2004, leading Judge Gold to allow plaintiffs to re-convene the depositions of Mr. Louis and Mr. Daus, albeit by written questions. Defendants have yet to respond.

[177] 108 F. Supp.2d at 180-81.

Nor is there any defense. While legitimate reliance on advice of counsel may provide a partial basis for defense to a claim for punitive damages, it does not apply in this case. Defendants have the burden of proof on this issue. *Gomez v. Toledo*, 446 U.S. 635, 639-640 (1980). They cannot begin to meet it.

Here, defendants cannot even recall what their attorneys said. Without such proof, with nothing in writing, the advice cannot be considered substantial. Nor can they prove that the attorney (to the extent it was Daus) was independent. Indeed, given Mr. Daus's admission that his first loyalty was to Ms. McGrath-McKechnie, this Court can only conclude his advice was far from objective. They cannot show that the advice addressed the constitutionality of the proposed action, that the attorney had all the relevant facts, or that the advice was sought before they resolved to act. Without such proof, there is no advice of counsel defense even to consider. *Johnston v. Koppes*, 850 F.2d 594, 596 (9th Cir. 1988).

Defendants' callousness was completely in character. The same indifference was repeated when defendants ignored—again without analysis—the decisions of the OATH judges. It was repeated again when defendants brushed aside the concerns of the TLC commissioners. It was repeated again when they ignored the initial decision of the Court. In short, they were repeatedly reckless and callously indifferent to the federally protected rights of others. There is no question about the facts as defendants admitted them. Accordingly, this Court should order that punitive damages be paid as matter of law.

CONCLUSION

For the reasons stated, plaintiffs' should be granted summary judgment as to their judicial bias claim and as to their claim for punitive damages. For the same reasons,

defendants' claim for summary judgment granting them qualified immunity should be denied.

Dated: New York, New York
December __, 2004

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CERTIFICATE OF SERVICE

I hereby certify that on December __, 2004, I caused the foregoing to be served as indicated on the parties listed below.

_____

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