

## ***Police Dep't v. Drummond***

OATH Index No. 1704/13, mem. dec. (Apr. 3, 2013)

Petitioner failed to establish its entitlement to retain a vehicle seized as the instrumentality of a crime where it failed to demonstrate that it served the registered owner of the vehicle with notice of the right to request a retention hearing at the time of the seizure or by mail within five business days after the seizure, as required by federal court order. Vehicle ordered released.

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### **NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS**

*In the Matter of*  
**POLICE DEPARTMENT**  
*Petitioner*  
*- against -*  
**GREGORY DRUMMOND**  
*Respondent*

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### **MEMORANDUM DECISION**

**KARA J. MILLER**, *Administrative Law Judge*

Petitioner, Police Department, brought this proceeding to determine its right to retain a vehicle seized as the alleged instrumentality of a crime pursuant to section 14-140 of the Administrative Code. Respondent, Gregory Drummond, the registered and titled owner of the seized vehicle, was driving at the time of the seizure (Pet. Ex. 4). This proceeding is mandated by *Krimstock v. Kelly*, 2007 U.S. Dist. LEXIS 82612 (S.D.N.Y. Sept. 27, 2007) (the "*Krimstock Order*"). See generally *Krimstock v. Kelly*, 306 F.3d 40 (2d Cir. 2002), *County of Nassau v. Canavan*, 1 N.Y.3d 134 (2003).

The vehicle, a 2005 Ford Crown Victoria sedan, property invoice number 3000158200, was seized on December 17, 2012, following respondent's arrest for aggravated unlicensed operation of a motor vehicle, driving while impaired by drugs and alcohol, and failing to signal (Pet. Exs. 1A, 1B, 1C, 1D). After receiving a demand for a hearing on March 8, 2013, the Department scheduled a hearing for March 21, 2013 (Pet. Ex. 6D). The Department and respondent each submitted documentary evidence. Respondent did not appear personally at the

hearing on March 21, 2013, because of childcare issues. Although, prior to going on the record, respondent's counsel was offered an opportunity for an adjournment to permit respondent to attend the hearing, he declined and asserted he would proceed on documents alone, including an affidavit from respondent. The record remained open until Monday, April 1, 2013, for the parties to submit written closing arguments.

### **PRELIMINARY ISSUES**

Respondent served petitioner with a formal discovery request on March 15, 2013. The discovery request advises the Department that the respondent is represented by Latham & Watkins LLP. It states in pertinent part,

We demand that you provide us with discovery of **all evidence** held by the New York City Police Department ("Police") concerning Mr. Drummond's seizure proceedings including, without limitation, any material Police may seek to rely on to demonstrate that Mr. Drummond was provided with notice of his right to a post vehicle seizure hearing. (emphasis added).

(Resp. Ex. A).

The Department responded to the discovery request on March 19, 2013, forwarding copies of: the Vehicle Seizure Form, affidavit of personal service from the arresting officer; Notice of Right to a Retention Hearing (provided by respondent's counsel); Petition and Notice of Hearing; Office of Administrative Trials and Hearings Intake Sheet; and Affidavit of Mailing of Retention Hearing Notice (Resp. Ex. B). The following documents were absent from the discovery packet even though the Department intended on introducing them at the hearing: the arrest report; the complaint report; the criminal court complaint; the New York State Unified Court System: WebCrims Case Details; New York State Repository Inquiry Report; the Property Clerk's Motor Vehicle Invoice; and DMV abstracts (Pet. Exs. 1A, 1B, 1C, 1D, 3, 4, 5).

Nonetheless, the Department contended that it fully complied with respondent's discovery request because it had interpreted the request to be only for documents pertaining to notice. The Department was unable, however, to justify its limitation on discovery production when it was noted that respondent's request explicitly demands "all evidence."

"[Discovery] is the trial lawyer's major preparation tool. Its purpose is to prevent litigation from becoming a game by requiring parties and witnesses to shed their light before the

trial so as to prevent surprise at it.” David D. Siegel, *New York Practice* § 343 (4th ed. 2005). *See also Dep't of Housing Preservation & Development v. Porres*, OATH Index No. 627/06 at 4 (June 16, 2006). The purpose of discovery is to “advance the function of a trial to ascertain truth and to accelerate the disposition of suits”. *Rios v. Donovan*, 21 A.D.2d 409, 411 (1st Dep't 1964); *see also Hoenig v. Westphal*, 52 N.Y.2d 605 610 (1981). In order to accomplish this goal, parties should disclose all evidence relevant to the case and all information reasonably calculated to lead to relevant evidence. David D. Siegel, *New York Practice* § 344 (4th ed. 2005). The Department should be mindful in future cases that discovery should be complied with completely, literally, promptly, and in good faith. *See Dep't of Transportation v. Jones*, OATH Index No. 1517/07, mem. dec. at 6 (May 10, 2007).

One of the documents that the Department did include in its discovery packet was a copy of the Vehicle Seizure Form. The copy is so poor that it is completely illegible. There are some dots and scratch marks, but there is not one legible word on the form. It is impossible to see the arresting officer's name and signature, the driver's name, the year and make of the vehicle seized, the date and time, and whether the “refused to sign box” is checked off (Pet. Ex. 6A; Resp. Ex. B).

In addition to being questioned about limiting its response to respondent's discovery request, the Department was also asked why it submitted an illegible Vehicle Seizure Form, as one of the few documents in its discovery packet. Petitioner's counsel replied that it was the only copy of the Vehicle Seizure Form in her possession (Tr. 25). She realized at the time that the document was difficult to read so she obtained an affidavit from the arresting officer, which accompanied the virtually blank Vehicle Seizure Form (Resp. Ex. B). The Affidavit of Personal Service from the arresting officer, Police Officer Benjamin Aboagye, states that at 3:16 a.m., he arrested respondent and seized his vehicle. Officer Aboagye's affidavit further states that at the time of the arrest, he personally served the Vehicle Seizure Form containing the Notice of Right to a Retention Hearing (Resp. Ex. B).

Although Officer Aboagye's affidavit is unsworn and not notarized, it does contain a statement in bold above the signature line that states, “False statements made herein are punishable as a class A misdemeanor pursuant to section 210.45 of the penal law.” A warning notice regarding penal law section 210.45 renders the signature equivalent to an oath or

affirmation under the New York State Constitution. *See People v. Sullivan*, 56 N.Y.2d 378, 384 (1982) (“[A] statement containing such a warning is, practically as well as theoretically, no different from a statement under oath.”); *see also In re Shermaine J.*, 208 A.D.2d 158, 165 (1st Dep’t 1995) (“a form notice pursuant to Penal Law section 210.45 combined with the subscription of the deponent constitute the functional equivalent of a statement under oath and is sufficient to verify an instrument.”).

While the officer’s affidavit containing a warning pursuant to Penal Law section 210.45 may be afforded the same weight as a statement under oath, the reliability of this particular affidavit is questionable on several grounds. The affidavit is notably silent as to whether respondent accepted or refused service at the time of the arrest. *See Police Dep’t v. Ramirez*, OATH Index No. 2418/07, mem. dec. at 6 (July 16, 2007) (Department failed to meet its burden in establishing that respondent refused service because the vehicle seizure form was incomplete). This affidavit was presumably signed by Officer Aboagye on March 18, 2013, three months after the vehicle was seized. The three-month gap between the alleged personal service and when the affidavit was issued, calls the reliability of Officer Aboagye’s recollection of this particular seizure into question. This tribunal has repeatedly advised the Department of the need to produce contemporaneous affidavits of service. *See, e.g., Police Dep’t v. Lee*, OATH Index No. 778/08, mem. dec. at 10-11 (Oct. 31, 2007). “A stale affidavit of service undermines its reliability and affects the weight it will be accorded.” *Police Dep’t v. Blackwell*, OATH Index No. 164/13, mem. dec. at 6 (Aug. 21, 2012). *See also CACV of Colorado, LLC v. Atekh*, 2009 N.Y. LEXIS 2374 at \*6 (Civ. Ct. Kings Co. Aug 20, 2009) (a contemporaneous affidavit of service raises the presumption that proper mailing occurred, while one executed over three years after the mailing was given “absolutely no weight”). Additionally, Officer Aboagye’s signature on the personal service affidavit is completely indecipherable.

Immediately prior to hearing, the parties discussed settlement during a pre-hearing conference. As a result of the discussions regarding the evidence, petitioner’s counsel called the Department and within an hour obtained another copy of the Vehicle Seizure Form (Pet. Ex. 7). The substituted copy is marginally better than the virtually blank copy initially turned over by the Department in discovery and submitted into evidence (Pet. Ex. 6A; Resp Ex. B). The information written in several of the boxes while very faint is somewhat decipherable, such as

the arresting officer's printed last name; the year and make of the vehicle; and the vehicle identification number. It is also possible to decipher the date and time that respondent was allegedly served with the form which is noted as, "12/17, 2012 at 0300." Remarkably, this indicates that respondent was served with the vehicle seizure form 16 minutes before he was arrested and the vehicle was seized. The box indicating that respondent refused to sign is also checked off.

This substituted copy of the form also purportedly bears the signature of the serving officer (Pet. Ex. 7). This signature, however, does not match the signature on the same officer's affidavit of personal service dated March 18, 2013 (Resp. Ex. B). Without having the benefit of handwriting expertise, a layperson's observation of the signatures can readily demonstrate that they are not the same. *See Thomas v. Coughlin*, 145 A.D.2d 695, 696 (3d Dep't 1988) (a hearing officer may evaluate handwriting in the absence of expert testimony); *Orix Credit Alliance, Inc. v. Pasta Tree Café*, 2008 N.Y. Misc. LEXIS 8266 at \*6 (Sup. Ct. N.Y. Co. Feb. 29, 2008) (a trier of fact may make her own comparison of a handwriting sample in the absence of any expert testimony). On the affidavit, Officer Aboagye's signature is a large loopy circle with a straight line trailing off. In comparison, the signature on the vehicle seizure form has clearly distinguishable letters, notably "b," "o," "g," "y," and "e". There is neither a loopy circle nor a straight line present in the signature on the seizure form. Since the affidavit was not notarized, no one verified the identity of the person signing it. Regardless, the signatures do not match and there is no way to determine who signed which document. *See Poughkeepsie Savings Bank, FSB v. Tyson*, 170 A.D.2d 818 (3d Dep't 1991) (handwriting samples differed enough from allegedly false signature to raise doubt as to its authenticity).

During the hearing, I reserved decision on whether to admit Department's substituted Vehicle Seizure Form because it had not been produced during discovery. Respondent argued that it was unfair for the Department to produce an unreadable document in response to a discovery request and during the hearing introduce a more legible copy into evidence. Moreover, despite petitioner's contention that the initial submission was the best available copy, petitioner's counsel was able to obtain a slightly better version within 45 minutes of requesting it on the day of the hearing. In its closing brief, petitioner noted that its discovery response states,

The Property Clerk has undertaken to acquire any other documents that may exist to demonstrate notice of a vehicle retention hearing.

The Property Clerk will treat this as a continuous request and if the Property Clerk receives documents, they will be forwarded to your attention.

(Resp. Ex. B). Petitioner argued that since respondent's request was a continuous request its production of the document during the hearing was timely. Petitioner's contention, however, is disingenuous. Petitioner did not attempt to find a better copy of the document until the issue was raised during the pre-hearing settlement conference held immediately prior to the hearing. Had the issue not been raised by respondent, it is highly doubtful that petitioner would have made an effort to obtain a more legible copy.

Normally, a decision on whether to preclude a document introduced on the date of trial would rest on whether the late introduction would be prejudicial to the non-producing party. If the late production of a document would deny a party due process then it will likely be precluded. *Cf. Dep't of Correction v. Brown*, OATH Index No. 180/88 at 2-3 (July 8, 1988) (despite the Department's failure to produce a portion of discovery material until the morning of trial, the discovery was admitted into evidence because it did not deny respondent due process). Here, the Department's substituted Vehicle Seizure Form does not deny respondent due process and is actually more prejudicial to the Department than it is to the respondent, as it indicates that respondent was served with the form before he was arrested and the signature of the attesting officer does not match the same officer's signature on a submitted affidavit. Therefore, the Department's motion to move the substituted Vehicle Seizure Form into evidence is granted.

### ANALYSIS

The *Krimstock* Order is specific that the Department must provide notice of the right to a retention hearing in two ways:

Notice of the right to a hearing will be provided at the time of seizure by attaching to the [property clerk's] voucher already provided to the person from whom a vehicle is seized a notice, in English and Spanish, as set forth below. A copy of such notice will also be sent by mail to the registered and/or titled owner of the vehicle within five business days after the seizure.

*Krimstock* Order, ¶ 4. The Order itself provides the form which the Department is required to serve upon the driver and owner. The form, captioned "Notice of Right to Retention Hearing,"

explains that “[y]ou are entitled to a hearing to determine whether it is valid for the Property Clerk to retain the vehicle seized in connection with an arrest,” indicates that the form may be mailed to the Legal Bureau of the Police Department to request a hearing, and otherwise provides important information about the place, subject matter, and timing of the hearing. *Krimstock* Order, ¶ 4.

We have consistently held that the notice requirement in the *Krimstock* Order is not “an empty formality.” *Police Dep’t v. Cromer*, OATH Index No. 2362/10, mem. dec. at 2 (Apr. 19, 2010); *Police Dep’t v. Lugo*, OATH Index No. 2402/07, mem. dec. at 5 (July 31, 2007); *Police Dep’t v. Ruiz*, OATH Index No. 1440/07, mem. dec. at 3 (Mar. 27, 2007). It is respondent’s obligation to raise a lack of notice as an affirmative defense. *See Krimstock v. Kelly*, 506 F. Supp. 2d 249, 257-58 (S.D.N.Y. 2007). Once notice is challenged, the Department must show that it met its service obligations. *Police Dep’t v. Lee*, OATH Index No. 778/08, mem. dec. at 11-12 (Oct. 31, 2007) (noting the need for the Department to “keep detailed records proving the two required types of service of notice of the driver’s and owner’s hearing rights” and to be prepared to meet “now-typical motions” to dismiss for failure to notify respondent of his or her rights); *see also Police Dep’t v. Byrd*, OATH Index No. 648/10, mem. dec. at 3 (Sept. 23, 2009).

Respondent’s counsel raised the affirmative defense that the Department failed to provide respondent with notice of the right to the hearing at the time of the seizure and that respondent was not notified by mail within five days either. As noted earlier, respondent was not present for the hearing. Instead, he provided an affidavit with attachments, in which he attested that the Department did not serve him with any documents at the time of his arrest (Resp. Exs. C, D, E, F). He further stated that he had been in custody from the date of his arrest on December 17, 2012, through the Christmas holiday. He maintained that he did not learn that his car had been seized until after his release when he contacted the local police precinct to ask about his car’s location (Resp. Ex. C).

Respondent’s affidavit states that on January 2, 2013, he received a letter from the Department’s Property Clerk’s office dated December 29, 2012, concerning the location of his car (Resp. Ex. E). The following day, January 3, 2013, respondent received a letter dated January 2, 2013, informing him that the forfeiture action against his vehicle was being considered for settlement (Resp. Ex. F). The letter sets out the terms of settlement and directs

him to return the enclosed settlement agreement within ten days if he is interested in settlement.

Respondent further swears that he never received anything from the Department advising him of his right to a hearing to contest the Department's seizure of his vehicle, either at the time of the arrest or by mail.

In rebuttal, petitioner submitted two copies of the Vehicle Seizure Form and a supporting affidavit from the arresting officer (Pet. Exs. 6A, 7; Resp. Ex. B). The officer's affidavit states that he served respondent personally with the vehicle seizure form at 3:16 a.m. on December 17, 2012.

The Department argued that respondent's affidavit denying service at the time of the seizure should be afforded little probative value, citing *Police Department v. Lopez*, OATH Index No. 2045/11, mem. dec. (Apr. 8, 2011). In *Lopez*, I noted that an affidavit must, by its nature, be accorded less weight than live hearing testimony in which a witness's demeanor can be observed by the fact-finder and which is subject to cross-examination. OATH 2045/11 at 3 (citing *Dep't of Buildings v. 159-17 Meyer Ave., Queens*, OATH Index No. 1849/10 at 8 (Nov. 1, 2010)). I found Mr. Lopez's perfunctory affidavit to be insufficient to rebut the Department's proof that he had been served with the Vehicle Seizure Form at the time of his arrest.

*Lopez*, however, can be distinguished from the current case. In *Lopez*, the respondent's affidavit was "too brief and formulaic to constitute a reliable account of what transpired." *Lopez*, OATH 2045/11 at 4. Such is not the case here. Respondent's affidavit with attachments is very comprehensive. It sets forth detailed facts and circumstances particular to his arrest and the seizure of his vehicle. Respondent's affidavit further indicates that he not only did not receive personal service at the time of his arrest, he never received service by mail either.

Furthermore, the Vehicle Seizure Form in *Lopez*, was both legible and completely filled out and signed by the arresting officer. In contrast, the Vehicle Seizure Form in this case is barely legible. Even with the admission of the substituted Vehicle Seizure Form it is difficult to read the driver's name as well as several other portions of the document. There is also some question as to the authenticity of the arresting officer's signature.

In prior vehicle forfeiture cases, corroboration of respondents' denials of proper service is often found in some irregularity within the Vehicle Seizure Form. See *Police Dep't v. Pizarro*, OATH Index No. 2625/10 at 3-4 (June 1, 2010) (respondent possessed the "white copy" of the

Vehicle Seizure Form, which could only have been given to her in error, and she testified credibly); *Police Dep't v. Lara*, OATH Index No. 886/10, mem. dec. at 4 (Oct. 14, 2009) (the officer did not enter the time and date that the notice was served and respondent testified credibly); *Police Dep't v. Figueroa*, OATH Index No. 1525/08, mem. dec. at 3 (Feb. 15, 2008) (finding that “. . . [t]he form supports respondent’s testimony that he was not served at the time of arrest” because “the form was not signed by the arresting officer and it failed to indicate a reason why respondent did not sign”). The Vehicle Seizure Form in this case is partly illegible. *See Police Dep't v. Karmansky*, OATH Index No. 1694/07, mem. dec. at 4 (Mar. 30, 2007) (Department failed to meet its burden by submitting a Vehicle Seizure Form in which critical information was illegible). As discussed above, it is also unclear whether the arresting officer actually signed the form because the signature does not match the officer’s signature on his affidavit of personal service.

The documentary evidence submitted by the Department is inconsistent. Besides the officer’s signatures on the Vehicle Seizure Form and affidavit of personal service not matching, there is a question with respect to the time of the alleged service. The supplemental affidavit by the arresting officer indicates that respondent was arrested at 3:16 a.m. and he was served with the Vehicle Seizure Form at the time of his arrest (Resp. Ex. B). The Vehicle Seizure Form, on the other hand, indicates that it was served on respondent at 3:00 a.m., 16 minutes prior to him being arrested and his vehicle being seized (Pet. Exs. 6A, 7; Resp. Ex. B).

Petitioner argued in its closing brief that the fact that the time of arrest was inconsistent on its exhibits constituted harmless error because an arrest can take more than eight hours to process. While it may be true that processing an arrest is a lengthy process, I decline to adopt petitioner’s view that it is harmless error. At some specific point in time respondent was placed under arrest and was in police custody. The length of time it takes to complete the paperwork and process the arrest is a separate issue. Moreover, there is no factual basis to establish that this particular arrest took over eight hours to process since the arresting officer did not testify. Indeed, as police officers generally do not testify during these forfeiture hearings, the accuracy of the documents submitted are even more critical because they are the entire basis for petitioner’s case. *See Police Dep't v. Romo*, OATH Index No. 658/13, mem. dec. at 8 (Nov. 29, 2012) (hearsay is admissible under the *Krimstock* Order, however, it must be sufficiently probative and

must have some objective circumstances demonstrating its reliability before it is given significant weight), (citing *Police Dep't v. Mazzoli*, OATH Index No. 1610/07, mem. dec. at 4 (Apr. 6, 2007)).

Where the documentary evidence offered by the Department conflicts with itself, this tribunal has generally found such evidence to be unreliable. *See Romo*, OATH 658/13 at 7 (Department did not establish probable cause where the narratives on the arrest and complaint reports were materially different from the criminal court complaint); *Police Dep't v. McIntosh*, OATH Index No. 1448/11, mem. dec. at 4-5 (Jan. 19, 2011) (Department did not establish probable cause because of inconsistencies between the arrest report and the criminal court complaint regarding the location of marijuana inside the vehicle); *Police Dep't v. Jones*, OATH Index No. 3391/09, mem. dec. at 5-6 (June 30, 2009) (Department did not establish probable cause where the arrest and complaint reports indicated that the respondent was stopped because he failed to use his turn signal, but the criminal complaint failed to charge the traffic violation or reference the presence of the vehicle at the scene). Based on the weight of the evidence, I find that petitioner failed to establish that it served respondent with notice of his right to request a hearing at the time of the seizure.

With respect to service by mail, the Department failed to provide any evidence that it mailed a notice of his right to a retention hearing at any time, let alone within five days of the seizure. Indeed, the Department acknowledged that service by mail was untimely (Tr. 26, 49). The mail-notification requirement is not a needless formality which the Department has the option of ignoring. *See Police Dep't v. Figueroa*, OATH Index No. 1525/08, mem. dec. at 4 (Feb. 15, 2008); *Police Dep't v. House*, OATH Index No. 587/07, mem. dec. at 4 (Sept 27, 2006).

I find that the Vehicle Seizure Form was not personally served on the respondent at the time of the seizure nor was it mailed within the required timeframe as set forth in the *Krimstock* Order. This tribunal has consistently held that the *Krimstock* notice requirements are to be strictly constructed against petitioner, and dismissed where these requirements were not strictly complied with. *See Police Dep't v. House*, OATH Index No. 587/07, mem. dec. at 4 (Sept. 2006) (motion to dismiss granted where petitioner failed to serve respondent with timely notice of her right to a retention hearing at the time of her arrest and by mail within five days of her

arrest); *see also Police Dep't v. Montes*, OATH Index No. 1372/06, mem. dec. at 6 (Mar. 14, 2006). Therefore, application of the *Krimstock* Order and the principles of due process of law mandate dismissal of the petition and the return of respondent's car.

**ORDER**

The Department has failed to comply with the notice requirements of the *Krimstock* Order. Accordingly, it is ordered to release respondent's vehicle.

Kara J. Miller  
Administrative Law Judge

April 3, 2013

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