STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: JULY 4 EVER, INC. AND VINCENT ESPOSITO, Petitioners, To Review Under Sections 101 and 463 of the New York State Labor Law: An Order and Determination of the Commissioner of Labor issued and filed April 15, 2008, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PES 08-003 RESOLUTION OF DECISION

APPEARANCES

Bernfeld, DeMatteo & Bernfeld, LLP, Joseph R. DeMatteo of counsel, for Petitioners July 4 Ever, Inc., and Vincent Esposito

Maria L. Colavito, Counsel to the Department of Labor, Jeffrey G. Shapiro of counsel, for Respondent Commissioner of Labor.

WHEREAS:

The Petition in the above-captioned case was filed with the Industrial Board of Appeals (Board) on June 12, 2008. Petitioners July 4 Ever, Inc., and Vincent Esposito (together, Petitioners) contest the reasonableness and validity of the Determination and Order (one document) that the Commissioner of Labor issued against them on April 15, 2008. After an evidentiary hearing, the Commissioner found that Petitioners: (1) improperly stored fireworks on their premises in an unlocked and unattended truck; (2) falsely asserted that they had no employees on applications for renewal of explosives licenses in 2005, 2006, and 2007; and (3) obtained permits for public display of fireworks under false pretenses. Based on the findings, the Commissioner determined that Petitioners are not sufficiently reliable and experienced to hold a License to Deal in or Manufacture Explosives and Explosive Magazine Certificates and ordered that Petitioners' License and four Certificates be revoked.

Among Petitioners' claims on appeal are that the Determination and Order (Order) is not supported by substantial evidence and is arbitrary, capricious, and an abuse of discretion because the Commissioner charged Petitioners with misconduct long after it purportedlyoccurred and only after the Board reversed, in favor of the Petitioners, an earlier order that the Commissioner had issued against them. Petitioners also claim that even if substantial evidence supports the misconduct alleged, the remedy of revocation is excessive; Petitioners have cured the purported misconduct; the alleged misconduct has not harmed anyone; the remedy of revocation is vindictive and the violations charged are a pretext to obtain the relief that the Commissioner sought in the earlier order that the Board reversed. The Commissioner filed an Answer denying the Petition's material allegations.

STATEMENT OF THE CASE

On May 15, 2007, the Commissioner issued an order revoking Petitioners' License to Deal in or Manufacture Explosives and their Explosives Magazine Certificates based on a finding that they improperly stored certain fireworks. On appeal, in a Resolution of Decision dated February 27, 2008, the Board found that the Commissioner had not established that the fireworks in issue were explosives that were subject to her regulation and revoked the May 15, 2007 order (*Matter of the Petition of July 4 Ever, Inc., and Vincent Esposito,* PES 07–009).

Thereafter, on March 7, 2008, pursuant to State Administrative Procedure Act (SAPA) § 401 (3) and Labor Law § 459 (2), the Commissioner issued an order summarily suspending Petitioners' License to Deal in or Manufacture Explosives and all their Explosives Magazine Certificates and gave Petitioners notice of the facts alleged to demonstrate that they are "not sufficiently reliable and experienced to be authorized to own, possess, store, transport, use, manufacture, deal in, sell, purchase or otherwise handle . . . explosives." As relevant here, the allegations were that Petitioners: (1) stored 1.3 display fireworks on their property on July 9, 2007, in an unlocked and unattended box truck, an improper storage magazine for such material; (2) falsely stated on license and certificate renewal applications that they had no employees when they knew or should have known that such statements were false; and (3) obtained and attempted to obtain local fireworks display permits that Penal Law § 405.00 requires by falsely stating, on two occasions in 2007, that they were covered by the proper indemnity insurance.

Pursuant to Labor Law § 459 (3), Petitioners requested an evidentiary hearing, which was held on March 28 and 31, 2008. On April 7, 2008,[1] the hearing officer issued a Report and Recommendation (Report) to the Commissioner, sustaining the above-noted three allegations against Petitioners and recommending that their license and certificates be revoked. By Order dated and filed April 15, 2008, the Commissioner adopted the hearing officer's Report. This appeal followed.

[1] The Report and Recommendation is actually dated April 9, 2007, apparently a typographical error.

Pursuant to the Board's Rules of Procedure and Practice (Rules) 66.9, on August 11, 2008, Petitioners filed an application to stay the Commissioner's revocation of their license, arguing that revocation is too harsh a remedy for the offenses found and that a stay would be necessary to allow the Board time to carefully review the hearing record and consider the parties' arguments. Petitioners further asserted that if allowed to stand, the Order would put Petitioners out of business in New York. The Commissioner opposed the application and urged that it be denied because Petitioners failed to meet the criteria to qualify for a stay that Rule 66.9 prescribes and were merely arguing the merits of the case. On September 24, 2008, the Board issued an Interim Resolution of Decision denying Petitioners' application for a stay (*Matter of the Petition of July 4 Ever, Inc., and Vincent Esposito,* PES 08–003).

LAW GOVERNING BOARD REVIEW

Labor Law § 459 (1) and (2) authorize the Commissioner to revoke an explosives license or certificate if the holder "is not sufficiently reliable and experienced to be authorized to own, possess, store, transport, use, manufacture, deal in, sell, purchase, or otherwise handle, as the case may be, explosives." The Department of Labor (DOL) has the burden of proving by substantial evidence the grounds for revoking an explosives license or certificate (SAPA § 306 [1]).

A decision of the Commissioner to revoke a license or certificate under Labor Law article 16 ("Explosives") may be reviewed by the Board and "[a]ll questions of fact . . . shall be decided by the commissioner and there shall be no appeal from his decision on any such questions of fact" (Labor Law § 463). The Board reviews "the validity or reasonableness of any . . . order of the commissioner" (Labor Law § 101[1]), and upon a finding that an order "or any part thereof is invalid or unreasonable," the Board "shall revoke, amend or modify the same" (Labor Law § 101 [3]).

Accordingly, the Board is empowered to review whether the findings upon which an order is based are supported by substantial evidence and whether the disposition, including any penalty imposed, is unreasonable. *See, e .g., Matter of Angello v Natl. Fin. Corp.,* 1 AD3d 850, 852 (3d Dept 2003) (court confirms Board's authority to revoke civil penalties imposed by Commissioner); *Matter of Hartnett v Camillus Elks Lodge*, 201 AD2d 408 (1st Dept 1994) (court confirms Board's authority to modify Commissioner's order by granting variances that Commissioner denied); *Matter of Roberts v. Indus. Bd. of Appeals,* 101 AD2d 674 (3d Dept 1984), *lv denied* 63 NY2d 607 (1984) (court confirms Board's powers to revoke, modify, or amend order to grant license and rejects Commissioner's assertion of unreviewable discretion to deny business license); *Matter of the Petition of July 4 Ever, Inc. and Vincent Esposito*, PES 07-009, *supra* (Board finds that Commissioner's order revoking explosives license and magazine certificates is not supported by substantial evidence and reverses order).

Whether an administrative agency's determination is supported by substantial evidence is a question of law. *Matter of Gramatan Ave. Assoc. v State Div. of Human Rights,* 45 NY2d 176, 181 (1978). The record is reviewed as a whole to see whether it contains a

rational basis for the findings of fact supporting the agency's decision. *Id.* at 182. "[S]ubstantial evidence consists of proof within the whole record of such quality and quantity as to generate conviction in and persuade a fair and detached fact finder that, from that proof as a premise, a conclusion or ultimate fact may be extracted reasonably – probatively and logically." *Id.* at 181. Substantial evidence is "[m]arked by its substance – its solid nature, and ability to inspire confidence [and] does not rise from bare surmise, conjecture, speculation or rumor." *Id.* at 180.

Hearsay evidence that is the sole basis for an administrative agency's determination must bear the indicia of reliability, that is, the hearsay evidence must be "sufficiently believable, relevant, and probative" in order to constitute substantial evidence. *Matter of Tsakonas v Dowling*, 227 AD2d 729, 730 (3d Dept), *lv denied* 88 NY2d 812 (1996). *See also Matter of Georgian Motel Corp. v New York State Liquor Auth.*, 184 AD2d 853, 855 (3d Dept 1992).

DISCUSSION

A. The Commissioner's finding that Petitioners improperly stored explosives in a box truck is based on a reasonable construction of the relevant law and supported by substantial evidence.

At hearing, a BATFE investigator testified that she and a second BATFE investigator found 594 shells of 1.3 display fireworks in the back of an unattended box truck parked on the premises of Petitioners' storage site on the morning of July 9, 2007, and that Petitioner Vincent Esposito was unable to explain when the truck had left or returned to the site. She also testified that the truck did not meet the requirements of a certified storage magazine and that Anthony Esposito, Petitioner Vincent Esposito's brother, told them that the truck had come on to the site within the previous twelve hours, sometime during the night between July 8 and 9, following a fireworks display and had never been unloaded. Both the BATFE investigator and a DOL inspector testified that display fireworks must be unloaded and returned to permanent magazines as soon as possible after they are returned to a storage site, regardless of the time of day or night. The testimony that DOL offered is undisputed; however, the record does not contain any evidence that the box truck was unlocked.

Explosives, such as display fireworks, are to be stored in certified magazines at storage locations unless they are being transported in delivery vehicles to a place of storage or use by a licensee, i.e., unless they are "in transit" (12 NYCRR 39.6). The governing regulations prohibit anyone who is in charge of a vehicle transporting explosives to allow the vehicle to remain unguarded or unattended except "if it is parked at a magazine site or other location established solely for the purpose of storing explosives" (12 NYCRR 39.11 [h]).

The Commissioner found that the truck was not certified as an explosives magazine, did not meet the statutory and regulatory requirements for use as an explosives magazine, and relying on the dictionary definition of "transit" as meaning to "pass over or through,"

found that the parked and unattended truck did not come within the "in transit" vehicle exception. Further, she drew an adverse inference in support of the finding that the truck was not in transit from Petitioners' failure to offer rebuttal to the evidence that the truck had been parked overnight with explosives inside or to show that the truck was in transit. We find that the Commissioner's construction of 12 NYCRR 39.6 is rational and that her determination that Petitioners improperly stored display fireworks overnight in a box truck that did not meet the requirements of a certified storage magazine is supported by substantial evidence.

Petitioners argue here that there was no storage violation because the explosives were "in transit" and the truck was parked at Petitioners' facility which is a storage magazine site. As we have determined that Petitioners' truck was not in transit, we necessarily reject Petitioners' argument that no storage violation occurred because the truck was parked at a secure site. The governing regulation requires both that the truck be in transit and if parked unattended during the in-transit phase, that it be parked at a secure location.

The Commissioner's finding that the box truck was unlocked is not supported by any record evidence.

B. The Commissioner's finding that Petitioners falsely stated that they had no employees on explosives license renewal applications in 2005, 2006, and 2007 is not supported by substantial evidence.

Each Application For License To Deal In Or Manufacture Explosives (Renewal Application) that Petitioner Vincent Esposito filed in 2005 and 2007 included his signed affidavit, swearing that Petitioners were not required to obtain workers' compensation insurance because they had no employees. The Commissioner found that Petitioners had employees in 2005, 2007, and apparently in 2006 as well, and that therefore the statements on Petitioners' Renewal Applications in these years were false.

On appeal, Petitioners argue that the Commissioner's finding is not supported by substantial evidence; is based almost exclusively on unreliable hearsay; and that given the gravity of the penalty of revocation, the failure to call witnesses who would be subject to cross examination violated Petitioners' due process rights. The Commissioner urges that her findings be sustained as reasonable.

Federal law requires "employee possessors" of explosives to file identifying data on BATFE Employee Possessor Questionnaires (BATFE Questionnaires). According to a BATFE publication in evidence entitled "Safety and Security Information for Federal Explosives Licensees and Permittees," an employee possessor of explosives is an employee who comes into actual or constructive possession of explosives materials during the course of employment.

The evidence supporting the Commissioner's finding that Petitioners falsely stated on Renewal Applications that they had no employees is comprised exclusively of Petitioners' Renewal Applications for 2005, 2006, and 2007; responses of individual declarants on BATFE Questionnaires filed in 2005 and 2006, naming the explosives

business where the declarant was an employee possessor; the responses of declarants on DOL Applications for License to Purchase, Own, Possess and/or Transport Explosives (DOL Possessor License Applications) listing experience handling explosives; a subpoena duces tecum issued by the Workers' Compensation Board to Petitioners' accountant; and in response to that subpoena, lists of payments that Petitioners made to various individuals (lists of Petitioners' payments).

Conceding that "none of these documents alone is dispositive," the Commissioner referred to the "totality" of this evidence as the basis for finding that the Petitioners had employees during the years that Petitioners claimed on their Renewal Applications that they did not have employees. The Commissioner drew an inference that Petitioners had four employees from the appearance of four individuals' names on the lists of Petitioners' payments and the appearance of the same names as declarants on BATFE Questionnaires and/or DOL Possessor License Applications in which reference is made to some version of the name July 4 Ever as a place where the declarant was either an employee possessor or gained experience with explosives.

The record shows that July 4 Ever, Inc., made payments in 2005 and 2006 to Michael Croissant, Anthony Esposito, Raymond Giannini, and Michael Letteri; that the names of these four were among those who listed "July 4 Ever" on BATFE Questionnaires filed in 2005 and 2006 as a business where they were employee possessors; and that on a single DOL Possessor License Application filed in 2005, one of the four declarants (Michael Croissant) also listed "July 4 Ever inc.," as one of the places that he gained experience in handling explosives.

At the outset, we find that because the workers' compensation portion of the 2006 Renewal Application is not in evidence and there is no other record support that even tends to show that Petitioners falsely stated on their 2006 Renewal Application that they did not require workers' compensation coverage because they did not have employees, the Commissioner's finding in regard to the 2006 Renewal Application is without any evidentiary support whatsoever.

We also find that the Commissioner's determination that Petitioners falsely represented that they did not have employees for workers' compensation purposes on their 2005 and 2007 Renewal Applications is based on evidence that is unreliable and therefore does not constitute substantial evidence.

None of the four declarants was called as a witness to testify that the written response on the BATFE Questionnaire that "July 4 Ever" was where the declarant was an employee possessor referred to Petitioner July 4 Ever, Inc. Similarly, Michael Croissant is the only name to appear on both the list of Petitioners' payments and DOL Possessor License Applications. Croissant was not called to testify that the various versions of July 4 Ever that appear on the DOL Possessor License Applications on which his name appears refer to Petitioner July 4 Ever, Inc. Such testimony was essential for a number of reasons.

The record is ambiguous as to whether the name "July 4 Ever" on any of the BATFE Questionnaires and DOL Possessor License Applications in evidence refers to Petitioner July 4 Ever, Inc. DOL's own evidence of corporate filings, workers' compensation records, and local fireworks display records establish that there are in addition to Petitioner July 4 Ever, Inc., two other corporate entities – July For Ever Displays, Inc., and July Forever Imports, Inc., – that also operate from Petitioners' address. July For Ever Displays, Inc., operated local fireworks displays and maintained workers' compensation insurance policies during the three years that Petitioners are charged with misrepresenting that they had no employees and therefore did not require workers' compensation coverage. All three entities use some form of the trade name "July 4 Ever" or "July For Ever."

Twenty-two of the twenty-four BATFE Questionnaires in evidence list as the employee possessor's place of business some spelling of July 4 Ever without reference to "Inc;" one lists "July Forever Displays;" and one lists "July 4 Ever Co. Inc." The four individuals whose names appear on the list of Petitioners' payments simply list "July 4 Ever" on the BATFE Questionnaire as the place where they are employee possessors.

Similarly, in response to the direction to list experience, on the nine DOL Possessor License Applications in evidence, "July 4 Ever Fireworks Inc." is listed on one Application; "July 4 Ever" is listed on six; and "July 4 Ever inc." is listed on two. Michael Croissant is the declarant on four of the nine DOL Possessor License Applications. Those four Applications contain three variations of the name July 4 Ever as a source of experience handling explosives. The 2002 Application lists "July 4 Ever inc" from 2000 to 2001 as a source of experience; the 2003 Application lists "July 4 Ever" from 2000 to the present as a source of experience; the 2005 Application lists "July 4 Ever inc" from 2000 to the present; and the 2008 Application lists "July 4 Ever Fireworks Inc." from 2001 to 2007. Additionally, as is apparent, the years of Croissant's experience with these entities overlap, making identity of the actual name or names of the business(es) at which Croissant gained experience virtually impossible.

Precisely in recognition that BATFE Questionnaires and DOL Possessor License Applications do not clearly identify which entity among the July 4 Ever entities each declarant was referring to, the Commissioner found that the forms "may or may not pertain to [Petitioner] July 4 Ever, Inc., and demonstrate the uncertainty among employees themselves regarding the entity which employs them." Nonetheless, in the very next sentence she makes an inconsistent determination by finding Croissant's reference to "July 4 Ever, inc." in the DOL Possessor License Application reliable because it is "the exact same corporate name as [Petitioner]." For the same reasons that the Commissioner found that reference to July 4 Ever "may or may not pertain to [Petitioner] July 4 Ever, Inc., we find in the context here that reference to July 4 Ever inc. may or may not refer to Petitioner July 4 Ever, Inc. The evidence supporting such conclusion is simply not probative.

The information contained in the BATFE Questionnaires and DOL Possessor License Applications lack reliability and probity for an additional reason. An agency record containing a statement by a declarant who is not part of the agency constitutes multiple levels of hearsay, and each level must be justified to be admitted into evidence. "The

maker's business duty to record the particular statement may authorize admission of the first level of hearsay (the business record) as proof that the statement was made;" however, an independent basis for the declarant's statement is necessary "to authorize admission of the second level for its truth" (Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C4518:3, at 443-48, 2007 ed.). *See Matter of Georgian Motel Corp. v New York State Liquor Auth.*, 184 AD2d 853, 855 (3d Dept 1992) (penalty of revocation annulled because it was based upon unreliable hearsay consisting of information received from a State Police Investigator that his agency had relevant "intelligence data" and newspaper and magazine articles).

Accordingly, in the absence of testimony from the declarants who completed the BATFE and DOL records in evidence, the statements in the records do not reliably establish that Petitioner July 4 Ever, Inc. was an employer at any time, or which entity using the trade name July 4 Ever, or July Forever, or July 4 Ever Inc. is referred to on them, or whether the entity identified as a source of experience was the declarant's employer, or even the years the declarant spent with a particular entity gaining experience. The Commissioner's inference that Michael Croissant, Anthony Esposito, Raymond Giannini, and Michael Letteri were Petitioners' employees in 2005, 2006, and 2007 is not reasonable given the ambiguity and unreliability of this double hearsay evidence.

In addition, we note that the federal and state records also contain information that undermines the Commissioner's conclusion that Petitioners had employees in 2005, 2006, and 2007. All DOL License Possessor Applications in which Michael Croissant is the declarant list self-employment as one basis for his experience during much of the same time that they indicate that he gained experience with one or more entities whose name is a version of "July 4 Ever." In 2002, "Self-employed" is listed as Croissant's experience from 1995 to 2000; in 2003 and 2005, "fireworks by Michael Croissant" is listed as his experience from 2000 to the present; and in 2008, "self employed license No 137251-0503-06" is listed as his experience from 2001 to 2005. Further, DOL License Possessor Applications dated 2004 and 2005 indicate that another individual obtained experience with "Fireworks By Michael Croissant" from, respectively, 2000 to the present and from 1995 to the present.

Furthermore, Anthony Esposito's BATFE Questionnaire lists his position as "Mgr," and evidence submitted by DOL itself establishes that he was an officer of July Forever Displays during the relevant time period. The 2005 BATFE Questionnaires of the other three individuals whom the Commissioner found to have been Petitioners' employees (Croissant, Giannini and Letteri) list the declarants' positions in the explosives business as, respectively, "display technician driver," "shooter display operator," and "display technician/driver," job functions likely to be used by a fireworks display operator. Indeed, Giannini and Letteri's names are listed in an April 2007 audit of OCT Inc., T/A July Forever Displays, by the New York State Insurance Fund conducted for the period March 3, 2006 to March 3, 2007.

Nor does the record support the finding that the lists of Petitioners' payments that Petitioners' accountant provided pursuant to subpoena are lists of wages paid to employees

of Petitioners. The subpoena and lists are in evidence as DOL exhibits. While the undated and unsigned subpoena requests that Petitioners' accountant produce the September 15, 2004 to December 20, 2007 records of July 4 Ever, Inc., and other corporations, including "[t]he names of all employees, classification of employees, dates of employment, and wages paid," the accountant's December 31, 2007 response, the first of three separate substantive responses to the subpoena, expressly states that July 4 Ever, Inc., has no employees.

The second of the accountant's substantive responses to subpoena attaches a list that the accountant describes as "all individuals that at this point [January 8, 2007] we have determined to be paid as per attached schedule." The list contains 18 names including Anthony Esposito, Michael Croissant, "RM" Giannini, and Michael Letteri. The third response, dated January 10, 2008, contains 21 names and includes the identical information as the second response with respect to the four at-issue individuals. To the extent that the Commissioner's findings that Esposito, Croissant, Giannini, and Letteri were Petitioners' employees may be based on an inference that the lists of Petitioners' payments are lists of employees, we find such an inference unreasonable in light of the Petitioners' accountant's express statement that Petitioners had no employees, the number of names on the lists that the evidence does not account for, and the fact that the lists themselves constitute multiple levels of hearsay.

The Commissioner attempted to reinforce the finding that the names that appear on BATFE and/or DOL records and the lists of Petitioners' payments in corresponding years were Petitioners' employees by drawing an adverse inference from Petitioner Vincent Esposito's failure to testify and establish, in the words of the Report, "that the individuals on the Listing of Payments are not employees and that the payments are not wages." According to the Report, the Commissioner drew "the strongest adverse inference which the opposing evidence in the record permits: the inference that [Petitioners] had employees during the time period in question." We find that the Commissioner drew an adverse inference from Petitioners' failure to put on evidence to rebut an inference that is unreasonable. We further find that if the Commissioner were privileged to draw any adverse inference here, a point that we do not now decide, the inference that she drew was unreasonably broad and not permitted by the record evidence.

In *Noce v Kaufman*, 2 NY2d 347, 353 (1957), cited by the Commissioner, the Court of Appeals stated that "[w]here an adversary withholds evidence in his possession or control that would be likely to support his version of the case, the strongest inferences may be drawn against him which the opposing evidence in the record permits." In *Noce,* the Court found that a defendant's testimony generally denying plaintiff's claims in the face of the plaintiff's specific testimony of the value of each item of labor or materials claimed justified an adverse inference against the defendant as to the value of each item of labor and materials. In contrast here, the Commissioner's adverse inference from Vincent Esposito's failure to testify is not based on specific "opposing evidence in the record." It is based on the unreasonable inference that the double hearsay in BATFE and DOL records that reference names resembling the name of Petitioner July 4 Ever, Inc., as places where the records' declarants obtained experience and the lists of Petitioners' payments that include the names of four of the records' declarants establish that Petitioners had employees.

The Commissioner assumes that Vincent Esposito did not testify because he was unable to disprove that he and July 4 Ever, Inc., had employees in 2005, 2006, and 2007; however, the Commissioner is not permitted to speculate about what Vincent Esposito's testimony might have been (*Matter of the Commissioner of Social Serv. v Philip De G.,* 59 NY2d 137, 141 [1983]; *855-79 LLC v Salas*, 40 AD3d 553 [1st Dept 2007]). The danger of speculation is especially clear where, as here, the record evidence is unreliable, ambiguous and susceptible to multiple inconsistent conclusions. If an adverse inference were warranted here, it could be based only on what the record permits (*Noce, supra)*, and therefore, must be limited to a finding that Petitioners could not disprove that the declarants on the BATFE and DOL records referred to names resembling July 4 Ever as places they gained experience with explosives and/or were employee possessors and that Petitioners made payments to the individuals whose names are on the lists produced by Petitioners' accountant.

We find that the Commissioner erred in finding that DOL met its burden below to establish that Petitioners had employees in 2005, 2006, and 2007, and any adverse inference that the Commissioner may have been privileged to draw from Petitioner Vincent Esposito's failure to testify would not change the outcome here because the record evidence does not permit a reasonable inference that Petitioners had employees.

We hold that the Commissioner's finding that Petitioners misrepresented on license renewal applications for 2005, 2006, and 2007 that they did not have employees is not supported by substantial evidence.

C. The Commissioner's finding that Petitioners obtained display permits under false pretenses is not supported by law or substantial evidence.

New York Penal Law § 405 (1) and (2) empowers local permit authorities to issue permits for the public display of fireworks. The permit application must state the "name of the body sponsoring the display" and provide other data concerning the persons in charge of firing the display (Penal Law § 405 [2] [a] – [h]). The permit granting authority "shall" require an adequate bond of no less than $5,000 from either the applicant or "the person to whom a contract for such display shall be awarded" for payment of any damages caused by the fireworks display arising by acts of "the permittee, his agents, employees, contractors or subcontractors." In lieu of a bond, the permit granting authority may accept an indemnity insurance policy with liability coverage and indemnity protection equivalent to the amount of the bond (Penal Law § 405 [4]).

In finding that Petitioners "obtained display permits under false pretenses," the Commissioner referred to "two contracts for fireworks displays to which July 4 Ever is a party but the insurance declaration pages are in the name of July Forever Displays." However, the Report that the Commissioner adopted relies on only one contract to which Petitioner is purportedly a party and provides no further information regarding a second contract.

The Commissioner found that the parties to the single contract in issue were July 4 Ever, Inc., and an entity known as Camp Starlight, located in Pennsylvania. Because the contract contained no proof of insurance issued to July 4 Ever, Inc., and the certificate of insurance listed July Forever Displays as the insured entity, the Commissioner concluded that the Petitioners obtained a permit under Penal Law § 405 using false pretenses.

The Commissioner's findings are erroneous in a number of respects. First, there has been no showing that New York law governs either the issuance of permits for fireworks displays or commercial dealings in Pennsylvania. Second, the Commissioner has not shown that a contract between private parties, one of which is located in Pennsylvania, concerning a display of fireworks at a Pennsylvania location should be treated as the equivalent of a permit issued under New York law. Third, the record evidence does not establish that Petitioner July 4 Ever, Inc. is a party to the contract. While July 4 Ever, Inc., is referenced in the contract, so are "July 4 Ever Custom Fireworks Display & Supply," "July Forever Displays," and "July 4 Ever." Fourth, the contract is not signed by anyone on behalf of any version of the name July 4 Ever. Fifth, the Commissioner's argument that she is entitled to consider bad acts committed by Petitioners in other states to determine whether they are sufficiently reliable to hold a New York explosives license is irrelevant. There has been no showing that the Petitioners engaged in any bad acts in other states.

The contract with Camp Starlight is the only evidence upon which the Commissioner relied to find that Petitioners obtained fireworks display permits under false pretenses. We find that the Commissioner's determination is unreasonable as it is not supported by either the law or the evidence.

D. The penalty of revocation is unreasonable.

In reviewing whether revocation of Petitioners' explosives license and magazine certificates is a "reasonable and valid" penalty for the single offense that we have sustained here, we evaluate all of the circumstances surrounding that offense in light of Labor Law § 459. That section provides that Petitioners' license and magazine certificates may be revoked upon a showing that Petitioners are "not sufficiently reliable and experienced to be authorized to own, possess, store, transport, use, manufacture, deal in, sell, purchase or otherwise handle . . . explosives."

It is undisputed that since 1999, Petitioners have held a license to deal in explosives as well as multiple explosive magazine certificates, all issued by DOL. Also undisputed is that BATFE has additionally licensed Petitioners for some time. Petitioners had operated a business selling, dealing in, storing, and handling large quantities of explosives for more than seven years when their license was revoked in 2007, after the Commissioner found that they violated Labor Law § 453. However, on appeal the Board vacated that determination (*Matter of July 4 Ever, Inc., and Vincent Esposito*, PR 07-009 [February 19, 2008]), and therefore, Petitioners' record is clear up to the finding here that they improperly stored explosives in a box truck on July 9, 2007.

As to this offense, the record shows that the fireworks that were improperly stored were returned to a magazine the afternoon of July 9, 2007, so that while the improper storage was serious, it was limited in time to some 12 hours. The Commissioner's argument on appeal, that there is no way of knowing when the explosives might have been returned to storage if BATFE investigators had not appeared, asks us to engage in speculation, which we decline to do. The fireworks were back in the bunkers by the afternoon and the violation cured. The Commissioner did not give weight to Petitioners' claims that security over and above federal and state requirements is maintained, i.e., a fence and closed circuit TV cameras provide added security. We find that the additional effort to have extra security demonstrates a vigilance to insure safety. Petitioners also commit to undertake whatever measures are necessary to insure to DOL that explosives are stored properly at all times and to coordinate with industry inspectors to see that all safety concerns are addressed.

The Commissioner found that each of the Petitioners' offenses that she sustained is sufficiently egregious to demonstrate that Petitioners are not sufficiently trustworthy or reliable to safely operate a highly dangerous enterprise that may affect public safety.[2] We disagree and find that the penalty of revocation is excessively harsh and entirely arbitrary for the single improper storage offense that we sustain. That penalty is therefore unreasonable. A suspension of Petitioners' license and certificates from March 8, 2008, the date of the Commissioner's initial suspension, to the date of our decision here – some twelve and one half months – is reasonable in light of the offense and the totality of circumstances.

For the above reasons, we find that the Determination and Order of the Commissioner imposing a penalty of revocation of Petitioners' explosives license and four magazine certificates is unwarranted and should be modified. We hold that the penalty of suspension of Petitioners' license and four certificates from March 8, 2008 to the date of our decision is reasonable.

CONCLUSION

The Commissioner's finding that Petitioners' improperly stored explosives in a box truck on July 9, 2007 is supported by the law and substantial evidence. Her findings that Petitioners made false statements on explosives license renewal applications in 2005, 2006, and 2007, and that they obtained explosives permits under false pretenses are not supported

[2] It must be noted that the Commissioner adopted the Report's finding that Petitioners attempted "to deceive the BATFE Investigators on July 9, 2007 by representing that Vincent Esposito was not present on [Petitioners'] premises when he was" and that this finding was one of the bases for her conclusion that Petitioners are not trustworthy or reliable. We do not address this finding for a number of reasons. First, the record does not establish that Petitioners had notice of such an alleged offense. Second, the Report itself, at footnote 3, states that "this Report and Recommendation shall address only those issues raised in paragraphs 'a', 'b', 'd', and 'e' of the Notice of Hearing. All testimony and evidence offered at the hearing, and any arguments advanced in Post Hearing Briefs that do not directly relate to the specific allegations contained in paragraphs 'a', 'b', 'd', and 'e' of the Notice of Hearing shall not be considered." As this alleged offense was not among those in the Notice of Hearing, the finding in this respect is beyond the scope of charges that should have been considered. Third, the record does not establish that Petitioner Vincent Esposito sought to deceive the BATFE inspectors regarding his presence at the Petitioners' presence on July 9, 2007.

by substantial evidence or the law. In light of our decision here, we find that it is unnecessary to reach any other issues.

THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The Commissioner's finding that Petitioners improperly stored explosives in a box truck on July 9, 2007 be, and hereby is, sustained; and

2. The Commissioner's findings that Petitioners falsely stated on applications in 2005, 2006, and 2007 to renew a License to Deal in or Manufacture Explosives that they had no employees and that they obtained explosives permits under false pretenses be, and hereby are, vacated; and

3. The Commissioner's Determination and Order revoking Petitioners' License to Deal in or Manufacture Explosives and Petitioners' four Explosives Magazine Certificates be, and hereby is, modified by replacing the penalty of revocation with the penalty of suspension of Petitioners' License to Deal in or Manufacture Explosives and Petitioners' four Explosives Magazine Certificates for the period from March 8, 2008 to the date of the decision here; and

4. In all other respects the Determination and Order of the Commissioner be, and hereby is, revoked.

Anne P. Stevason, Chairman

Susan Sullivan-Bisceglia, Member

J. Christopher Meagher, Member

Mark G. Pearce, Member

Jean Grumet, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York,
on March 25, 2009.