

**SUPREME COURT OF THE STATE OF NEW YORK**  
***Appellate Division, Fourth Judicial Department***

**1461**

**TP 17-01039**

PRESENT: CENTRA, J.P., PERADOTTO, DEJOSEPH, NEMOYER, AND CURRAN, JJ.

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IN THE MATTER OF MELISSA M. HUTTENLOCKER,  
PETITIONER,

V

MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES  
APPEALS BOARD AND THOMAS B. LENNON, AS DEPUTY  
COMMISSIONER OF NEW YORK STATE DEPARTMENT OF  
MOTOR VEHICLES, RESPONDENTS.

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CHIACCHIA & FLEMING, LLP, HAMBURG (DANIEL J. CHIACCHIA OF COUNSEL),  
FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (WILLIAM E. STORRS OF  
COUNSEL), FOR RESPONDENTS.

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Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by an order of the Supreme Court, Erie County [Donna M. Siwek, J.], entered June 1, 2017) to annul a determination of respondent. The determination revoked petitioner's license.

It is hereby ORDERED that the determination is unanimously confirmed without costs and the petition is dismissed.

Memorandum: Petitioner commenced this proceeding pursuant to CPLR article 78 seeking to annul the determination revoking her driver's license based on her refusal to submit to a chemical test following her arrest for driving while intoxicated (DWI). We confirm the determination. Contrary to the contention of petitioner, "having been lawfully arrested for DWI, [she] was not entitled to condition [her] consent to submit to a chemical test on first consulting with [her] attorney" (*Matter of Clark v New York State Dept. of Motor Vehs.*, 55 AD3d 1284, 1284 [4th Dept 2008]). Contrary to the further contention of petitioner, the determination is supported by substantial evidence. The arresting officer's testimony at the hearing, along with his refusal report, which was entered in evidence, established that petitioner refused to submit to the chemical test after being warned twice of the consequences of such refusal (see *Matter of Linton v State of N.Y. Dept. of Motor Vehs. Appeals Bd.*, 92 AD3d 1205, 1206 [4th Dept 2012]). " '[T]he Administrative Law Judge . . . was entitled to discredit petitioner's testimony to the contrary' " (*id.*). Petitioner's related contention that she was not adequately warned by the officer that "continuing to ask to speak to

her attorney would be considered a refusal" has been raised for the first time on appeal and, therefore, she has failed to exhaust her administrative remedies with respect to that contention (see *Matter of Mastrodonato v New York State Dept. of Motor Vehs.*, 27 AD3d 1121, 1122 [4th Dept 2006]; *Matter of Nawaz v State Univ. of N.Y. Univ. at Buffalo Sch. of Dental Medicine*, 295 AD2d 944, 944 [4th Dept 2002]).

Entered: December 22, 2017

Mark W. Bennett  
Clerk of the Court