

Matter of Persico v New York City Dept. of Bldgs.

2011 NY Slip Op 33439(U)

December 22, 2011

Sup Ct, NY County

Docket Number: 110711/2010

Judge: Martin Schoenfeld

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 28

-----X
IN THE MATTER OF THE APPLICATION OF
LAWRENCE PERSICO

Petitioner,

**MEMORANDUM DECISION
AND JUDGMENT**

FOR A JUDGMENT UNDER ARTICLE 78 OF THE
CIVIL PRACTICE LAW AND RULES TO VACATE
THE DECISION OF ROBERT D. LIMANDRI,
COMMISSIONER OF THE NEW YORK CITY
DEPARTMENT OF BUILDINGS TO REVOKE THE
HOIST MACHINE LICENSE OF LAWRENCE
PERSICO

-against-

Index No.: 110711/2010

THE NEW YORK CITY DEPARTMENT OF
BUILDINGS,

Respondent.

-----X
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HON. MARTIN SCHOENFELD, J.:

Petitioner Lawrence Persico (Petitioner) moves this Court for an order pursuant to CPLR Article 78 vacating the decision of Respondent Robert D. Limandri, Commissioner of the New York City Department of Buildings (DOB), which revoked Petitioner's hoist machine operator's license. Respondent asserts that Petitioner Persico's license was properly revoked for demonstration of "poor moral character" under NYC Administrative Code § 26-133, renumbered as § 28-401.6. For the reasons set forth below, the Court denies the petition and dismisses the proceeding.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

BACKGROUND

Petitioner has held a hoist machine operator's license since 1997. In 2003 Petitioner, along with 41 other defendants, was charged with Racketeer Influenced Corrupt Organizations Act, 18 U.S.C. §1962 ("RICO") violations allegedly orchestrated by organized crime families. In lieu of a trial, in October 2004 Petitioner pled guilty to one count of mail fraud for submitting false information to Operating Engineers Local 14 Union to obtain wages and benefits for work he did not perform. He was sentenced to 33 months in jail and a fine of more than \$750,000. Petitioner served 21 months and completed three years of post-release supervision.

DOB has renewed Petitioner's hoist machine operator's license annually since 1998. In June 2009, Petitioner submitted his annual application for renewal in which, for the first time, he was asked to disclose his history of criminal convictions or offenses. In the application he disclosed that he had been convicted of mail fraud and indicated that "the mail fraud conviction was gotten for using the U.S. Postal Service to mail illegally earned benefit stamps to the fund office of local 14 union of operating engineers." Verified Answer at 10. DOB granted Petitioner's 2009 renewal application.

In October 2009, however, after discovering that Petitioner's mail fraud conviction was part of a larger RICO case involving an organized crime family, DOB filed a petition with the Office of Administrative Trials and Hearings (OATH) initiating a proceeding to revoke Petitioner's license. Verified Answer at 10-11. In particular, DOB asserted that "the conduct underlying petitioner's plea of guilty" in the RICO case "reflected poor moral character" under Administrative Code §28-401.6 (formerly §26-133) . Verified Answer at 11. In March 2010, Administrative Law Judge (ALJ) Kevin Casey held a hearing in the case pursuant to OATH

rules.

At the OATH hearing, DOB introduced into evidence a copy of the transcript of Petitioner's guilty plea in 2004. It also called Frank Damiani, a DOB supervising inspector working in the Cranes and Derricks Units, as a witness. He testified about the responsibilities of hoist machine operators, the public safety aspects of the job and the dangers associated with it. He explained that operators have a lot of responsibility and must be "trustworthy" because of the safety concerns associated with crane operating. Verified Answer, Exhibit G at 24. Petitioner's counsel then cross examined Mr. Damiani.

Next, Mr. Persico testified on his own behalf. He confirmed that he pled guilty to mail fraud in 2004 and that he served 21 months in jail and three years of supervised release. Verified Answer, Exhibit G at 35-36. He also testified that he currently was paying restitution. He stated that he had been working as a hoist machine operator since his release, his license had been renewed each year, and that there had been no complaints about his work. Verified Answer, Exhibit G at 36-38. He explained that he was the "sole support" for his wife and two children ages 13 and 18. He indicated that without a hoist machine operator's license his job opportunities would be "very limited" and he would be "only eligible for the lowest" pay. Verified Answer, Exhibit G at 39-40.

Upon cross examination, Mr Persico confirmed that the activity for which he had been convicted occurred between 2000 and 2002 and that it involved submitting benefit stamps to the union for work he did not perform on two construction jobs. Verified Answer, Exhibit G at 44. He acknowledged that he was "forty-nine going on fifty" when he pled guilty and that he had held his hoist machine operator's license for three years at the time of the crime. Verified

Answer, Exhibit G at 41- 42. He also indicated that he had other licenses and that though his work opportunities would be limited he could find other work through the union. Verified Answer, Exhibit G at 43. Mr. Persico indicated, in response to a question by ALJ Casey, that he had paid \$5000 of the money he owed in restitution. Verified Answer, Exhibit G at 45.

On April 9, 2010, ALJ Casey issued a report finding that Petitioner Persico had violated NYC Administrative Code § 28-401.6 and recommending revocation of his hoist machine operator's license. Specifically, ALJ Casey found that Petitioner's conviction "proved that he committed misconduct related to the trade for which he is licensed" and had "demonstrated poor moral character" in violation of the Code. Verified Answer, Exhibit I at 3 (The report is also annexed to the Verified Petition as Exhibit B). In so finding, the ALJ noted that there was "a direct connection between" Petitioner's criminal conviction and his license and that the DOB had a "compelling interest in ensuring that crane operators are honest, trustworthy individuals." Verified Answer, Exhibit I at 5. He emphasized that being a hoist machine operator was a "safety-sensitive position where cutting corners, inattention, or an error in judgment can lead to death or serious injury." Verified Answer, Exhibit I at 5. In addition, he noted that the DOB "has an obligation to prevent the insidious influence of corruption in the construction industry" and that "inspectors cannot be at all locations at all times." Verified Answer, Exhibit I at 5. He went on to find that:

By his own admission, [Persico] falsely reported that he was working at construction sites. If [Persico] was missing from a job site, then he was incapable of ensuring that all necessary safety procedures were followed. Likewise, because [Persico] engaged in racketeering activity, he contributed to corruption at the job site. *Id.*

The ALJ concluded that DOB "has good reason to doubt [Persico's] fitness to be a hoist machine

operator.” Verified Answer, Exhibit I at 5. He emphasized that revocation of the license was the proper penalty noting that “[a]lthough [Persico] presented some mitigation, the weight of evidence supports license revocation.” Verified Answer, Exhibit I at 3.

In a letter dated April 23, 2010, Respondent adopted the recommendations of ALJ Casey and revoked Petitioner Persico’s license, quoting the ALJ’s opinion for its reasoning. Verified Answer, Exhibit J (The letter is also annexed to the Verified Petition as Exhibit C).

Petitioner now moves this court to vacate this decision pursuant to CPLR Article 78.

DISCUSSION

The instant proceeding need not be transferred to the Appellate Division

As a preliminary matter, the Court must determine whether, as suggested by the parties, there is a substantial evidence question here that requires transfer to the Appellate Division pursuant to CPLR sections 7803(4) and 7804(g). Section 7803 lays out several grounds on which a Petitioner may base an Article 78 Special Proceeding. Relevant here are sections three and four. Section three allows challenges on the grounds that the administrative decision “was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion.” CPLR § 7803(3). Under section four, the challenge is based on “whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.” CPLR § 7803(4). When a substantial evidence question is raised under this section, CPLR section 7804(g) directs the court to transfer the case to the Appellate Division “for disposition.” The courts have interpreted this provision as prohibiting “the Supreme Court from reaching the

issue of whether an agency determination is supported by substantial evidence” where the administrative decision was “made as the result of a hearing required by law.” *Verdell v. Lincoln Amsterdam House, Inc.*, 27 A.D.3d 388, 391 (1st Dept. 2006).

Whether a petition raises a substantial evidence question, however, is a determination decided by the court and not by how the parties characterize the issues. *Robinson v. Finkel*, 194 Misc.2d 55, 63 (Sup. Ct. NY County 2002); *LaFlamme v. Berger*, 87 Misc.2d 494, 496 (Sup. Ct. Onondaga County 1976); *Frederick v. Dumpson*, 84 Misc.2d 514, 515 (Sup. Ct. Queens County); *Ideal Corp. v. New York State Tax Comm.*, 132 A.D.2d 419, 422 fn 2 (3d Dept. 1987); *Maou v. The City of New York*, 2010 WL 7507640 (Sup. Ct. NY County 2010); see *Bonded Concrete v. Town Bd. Of Town of Rotterdam*, 176 A.D.2d 1137 (3d Dept. 1991). In making this determination, courts look to whether an Article 78 petition challenges “the respondent’s application of a rule to undisputed facts.” *Robinson*, 194 Misc.2d at 64. Where there are no issues of fact, no substantial evidence question arises. *Id.* at 64; *Sunrise Manor Ctr. For Nursing & Rehabilitation v. Novello*, 19 A.D.3d 426, 427 (2d Dept. 2005); *Maou*, 2010 WL 7507640 (Sup. Ct. NY County 2010); see *Roche v. Turner*, 186 Misc.2d 581, 589 (Sup. Ct. NY County 2000); Davis, Russell, et. al., NYJUR Article 78 § 29.

The Court is aware that there is some confusion among courts as to when, under CPLR §7804(g), the Supreme Court must transfer Article 78 cases to the Appellate Division. *Contrast Verdell v. Lincoln Amsterdam House, Inc.*, 27 A.D.3d 388, 390 (1st Dept. 2006) (citing *Silberfarb v. Board of Coop Educ. Servs.*, 60 N.Y.2d 979, 981 (1983)) (“Judicial Review of an administrative determination made as the result of a hearing required by law is limited to whether that determination is supported by substantial evidence.”); *East Midtown Plaza Housing Co., Inc.*

V. N.Y.C. Dept. Of Housing Preservation & Dev., 2007 WL 2176927 (Sup. Ct. NY County 2007); *Edison Parking, LLC v. The City of New York*, 2010 WL 4809137 (Sup. Ct. New York County 2010) with *LaFlamme v. Berger*, 87 Misc.2d 494, 496 (Sup. Ct. Onodaga County 1976) (“The mere fact that a fair hearing was held does not require transfer” to the Appellate Division under CPLR 7804(g)) (citing *Harris v. Lavine*, 43 A.D.2d 894 (4th Dept. 1974)); *Robinson*, 194 Misc.2d at 63; *Sunrise Manor Ctr.*, 19 A.D.3d at 427; *Frey v. The New York City Dept. Of Housing Preservation and Dev.*, 2011 WL 1898199 (Sup. Ct. NY County 2011); *Roche*, 186 Misc.2d at 589. Nevertheless, under the circumstances of this case, transfer would make little sense because there is no substantial evidence issue for the Appellate Division to decide.

Neither Petitioner nor Respondent have pointed to disputed issues of fact on which to base a substantial evidence claim. Indeed, among other things, Petitioner confirmed in his testimony before the ALJ that he pled guilty to mail fraud, spent 21 months in prison and has paid \$5000 of the more than \$750,000 he owes in restitution. Nor is it in dispute that Petitioner is the sole supporter of his family or that revocation of his license will likely give him fewer or less desirable job opportunities. Moreover, Petitioner’s counsel cross examined DOB’s witness, Mr. Damiani, and has not disputed his testimony regarding the duties and obligations of hoist machine licensees.

Thus, at issue here is not the factual record but whether, in light of these facts, DOB’s finding that the law required revocation of Petitioner’s hoist machine operator’s license was “arbitrary and capricious or an abuse of discretion” under CPLR section 7803(3). Accordingly, this Court need not transfer this case to the Appellate Division but must decide it under this standard. *See Sunrise Manor Ctr.*, 19 A.D.3d at 427; *Robinson*, 194 Misc.2d at 64.

The administrative determination was not arbitrary and capricious

An administrative determination by an agency is arbitrary and capricious when it is made “without sound basis in reason and is generally taken without regard to the facts.” *Pell v. Board of Education*, 34 N.Y.2d 222, 231 (1974); *Testwell, Inc. v New York City Dept. of Bldg.*, 80 A.D.3d 266, 276 (2010) (applying arbitrary and capricious standard to licensing case). The Court must give “great weight and judicial deference” to the expertise of the administrative agency’s determinations. *Testwell*, 80 A.D.3d at 276. It “may not substitute its judgment for that of” the administrative body. *Pell*, 34 N.Y.2d at 232 (citations omitted).

The Commissioner of Buildings is authorized to suspend or revoke a license, such as the one held by Petitioner, for, among other things, “[p]oor moral character that adversely reflects on his or her fitness to conduct work regulated by this code.” NYC Administrative Code § 28-401.19(13). The code also requires DOB building work licensees to “be of good moral character.” NYC Administrative Code § 28-401.6.

The Appellate Division, First Department, has recently provided guidance on when revocation of a DOB license for lack of “good moral character” under these sections of the Administrative Code is appropriate. In *Inglese v Limandri*, __ A.D.3d __, 2011 NY Slip Op. 08484 (App. Div. First Dept. 2011), *rev’g* 29 Misc.3d 1234(A) (Sup. Ct. NY County 2010), petitioner Inglese, who had held a hoist machine license since 2000, pled guilty in 2004 to conspiracy to commit extortion for receiving “preferential treatment in obtaining a job as an operating engineer to run material waste” at a job site. *Inglese*, 29 Misc.3d 1234(A) at *2. He was sentenced to one year and a day and was fined \$3000. *Id.* After being released from jail, Inglese returned to work and DOB renewed his hoist machine license in subsequent years. *Id.* In

2010, however, after an OATH hearing, an ALJ found Inglese lacked good moral character under NYC Administrative Code § 28-401.6 based on his prior conviction. *Id.* at *3. However, because DOB had presented no witnesses and had relied only on Inglese's conviction and the plea allocution to support its case, the ALJ recommended that Inglese's license be suspended for one year, rather than revoked, noting that DOB had failed to establish a connection between the type and severity of the crime committed and the job responsibilities of a hoist machine operator. *Id.* at *4.

DOB Commissioner Limandri disagreed and issued a letter revoking Inglese's license, stating that Inglese's "conduct was sufficiently serious to warrant revocation" of his license and not just suspension. *Id.* at *4. He noted that DOB "relies on the integrity and honesty of all licensees to assure public safety" and indicated that Inglese's "acts of receiving and providing preferential treatment for construction jobs are sufficient to establish poor moral character that adversely reflects on [his] fitness" to hold a hoist machine license.¹ *Id.* In reviewing Mr. Inglese's subsequent Article 78 petition, a Supreme Court Justice annulled the license revocation, essentially agreeing with the ALJ that "there was a fundamental failure of proof" of a connection between Inglese's job responsibilities and his conviction that "shock[ed] one's sense of fairness." *Id.* at *5.

The Appellate Division, reversed and dismissed the petition. *Inglese*, 2011 NY Slip Op. 08484. In doing so, it did not focus on the need to establish an evidentiary connection between

¹He also emphasized that Inglese was only 35 at the time of conviction, that the only evidence presented on his behalf was a letter from his spouse, and that the crime was directly related to the construction industry and was committed soon after he received his license. *Inglese*, 29 Misc.3d 1234(A) at *4.

the conviction and job responsibilities as did the *nisi prius* Justice, but instead merely found that where the conviction of a crime is “**directly related** to the use of the subject license” the licensee has demonstrated “poor moral character that adversely reflects on his fitness to hold a licensed position in the construction industry.”² *Id.* (emphasis added); *see also Carrara v. Limandri*, 2011 NY Slip Op 30937 (Sup. Ct. NY County 2011) (dismissing Article 78 petition challenging revocation of hoist machine operator’s license where licensee pled guilty to conspiracy to commit extortion for receiving a preferential construction job); *Cann v. Limandri*, 2011 NY Slip Op 31932 (Sup. Ct. NY County 2011) (upholding denial of application for renewal of Stationary Engineer license based on conviction for third degree burglary).

In the instant case, the direct relationship between Petitioner’s crime and his job responsibilities is, in any event, far clearer than in *Inglese*. DOB’s witness, Mr. Damiani, was a supervisor who had first hand knowledge of the work performed by hoist machine operators and testified about the safety concerns of the job and the need for honesty and integrity as a result. In addition, the evidence showed that Petitioner’s crime – mail fraud as part of a larger RICO case involving crime families – was directly related to his work as a hoist machine operator. Petitioner admitted in his testimony that he billed the union for work he did not show up for or perform. Both the ALJ and the Commissioner, in their decisions, emphasized that Petitioner’s mail fraud conviction had been for dishonesty *on the job*. The Commissioner noted that the DOB “has a compelling interest in ensuring that crane operators are honest trustworthy

²It also found that the imposition of the penalty of license revocation was “not disproportionate to the offense.” *Inglese v Limandri*, 2011 NY Slip Op. 08484. Moreover, the court noted that the Commissioner had “properly considered” the mitigating factors “set forth in Correction Law § 753.” *Id.*

individuals” and emphasized that “while working on construction jobs [Persico] participated in a criminal organization that defrauded a local operating engineer’s union.” Verified Answer, Exhibit J. The Commissioner found that such action evidenced “poor moral character” that made revocation of his license appropriate. Verified Answer, Exhibit J. This finding was rationally based on the uncontroverted evidence presented and entirely consistent with the First Department’s decision in *Inglese*.

In his Memorandum of Law in Further Support of Petition to Vacate Decision, Petitioner argues, however, that the revocation decision was arbitrary and capricious because it was based solely on his criminal conviction without taking into consideration the many mitigating factors in his case. Specifically, he argues that “Respondent arbitrarily failed to consider” evidence of Petitioner’s rehabilitation, including his ongoing repayment of restitution and that he was a good standing citizen who had not gotten into any trouble since his conviction. Petitioner also argues that the decision failed to consider “the devastating impact” revocation would have on “his ability to support his family and continue to make restitution.” .

This argument is unconvincing. As in *Inglese*, the finding of lack of good moral character here was based on the crime committed and its relationship to Petitioner’s job. Additionally, contrary to Petitioner’s assertions, the ALJ did consider his “mitigating factors” in making his decision, including the fact that “he has not had any problems at work” after his prison sentence and the “financial hardship” revocation would cause, but did not find them compelling in light of the seriousness of the crime committed. Verified Answer, Exhibit I at 5-6. He also acknowledged “the state’s public policy to encourage licensure and employment of persons previously convicted of one or more crimes” but noted that Petitioner had not received a

certificate of relief of disabilities entitling him to a presumption of rehabilitation, nor had he paid much of his restitution or “personally express remorse” during his testimony. Verified Answer, Exhibit I at 4-6. On the whole, in weighing the evidence, the ALJ found that “[t]he nature and gravity of [the] crime, committed when [Persico] was a mature adult over 40 years of age, justif[ied] revocation of his license despite the presence of some mitigation.”³ Verified Answer, Exhibit I at 6.

Nor did the decision ignore the fact that Petitioner’s license was renewed in 2009 after he had disclosed his conviction. As the ALJ rightly pointed out, DOB “could have been more vigilant.” Verified Answer, Exhibit I at 7. Nevertheless, DOB did initiate the revocation proceeding “within months of the license renewal.” Verified Answer, Exhibit I at 7. This “modest delay” in seeking revocation of Petitioner’s hoist machine operator’s license does not somehow make the DOB’s decision irrational. *See Inglese*, 2011 NY Slip Op. 08484.

This Court cannot now second guess DOB’s decision or substitute its own judgment here. DOB’s finding of lack of “good moral character”, pursuant to NYC Administrative Code section 28-401.6, was rationally based on the undisputed facts in the case, and was neither arbitrary nor capricious.

The penalty was not disproportionate to the offense and Correction Law factors were considered

Petitioner also contends that the penalty of revocation here “shocks the conscience” by depriving Petitioner of “his ability to work in his chosen vocation.” Memorandum of Law in

3. Petitioner also argues that the ALJ failed to consider his mental health issues as a mitigating factor here. At the beginning of the hearing the parties stipulated that Petitioner takes medication for bipolar disorder. However, as the ALJ pointed out, “no further evidence concerning when this condition was diagnosed, the extent of treatment, his prognosis or his ability to function” was offered to show its relevance to the issue of revocation. Verified Answer Exhibit I at 6.

Further Support of Petition to Vacate Decision. It is true that where the facts support the administrative determination yet the penalty is “so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one’s sense of fairness” the court may vacate the penalty and remand the case for imposition of a lesser penalty. *Pell*, 34 N.Y.2d at 233 (internal citations and quotations omitted). This is not the case here, however. As discussed above, the revocation decision was made by carefully balancing all of the circumstances involved including the severity of the crime, the safety and public policy concerns as well as Petitioner’s mitigating factors. Nor was the penalty of revocation here disproportionate in light of the seriousness of the crime and the direct relationship between the Petitioner’s illegal conduct and his responsibilities as a hoist machine operator. *See Inglese*, 2011 NY Slip Op. 08484 (finding penalty of license revocation was “not disproportionate to the offense”). Moreover, revocation of Petitioner’s hoist machine operator’s license will not deprive him of his ability to work, as he argues. As previously noted, in his own testimony, Petitioner admitted that although revocation may limit his work options, he has other licenses which will allow him to find other types of work through the union. Verified Answer, Exhibit G at 43.

Finally, Petitioner argues that equitable considerations support his petition, citing to Correction Law §752. Under this law, applications for licenses should not be “acted upon adversely” because of “lack of good moral character” when “based upon the fact that the individual has previously been convicted of one or more criminal offenses.” However, this law specifically allows for adverse action, when “there is a direct relationship between” the criminal offense “and the specific license” sought, or when granting the license “would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general

public.” Correction Law §752(1) & (2). As discussed above, the administrative decision here was based squarely on both the direct relationship between Petitioner’s conviction and his license and concerns for public safety. Moreover, the ALJ considered the factors listed in section 753 of the Corrections Law,⁴ including Petitioner’s age, work responsibilities, the seriousness of the crime and his “good conduct”, and found that they supported his recommendation for license revocation. *See Inglese, 2011 NY Slip Op. 08484.*

Therefore, the Court denies the Petition.

In accordance with the foregoing, it is

ADJUDGED that the petition is dismissed.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

J.S.C.

Dated: New York, New York

December 22, 2011

⁴Under section 753(1)(a) - (h) of the Correction Law, the factors to be considered concerning a previous conviction include (1) the state's public policy “to encourage the licensure and employment” of persons previously convicted; (2) the “specific duties and responsibilities necessarily related to the license or employment sought or held by the person”; (3) the “bearing” the offense “will have on his fitness or ability to perform” the duties of the job; (4) the “time which has elapsed” since the offense; the “age of the person” at the time it occurred; the “seriousness” of the crime; (5) information concerning the “rehabilitation and good conduct” of the offender; and (6) an interest in “protecting property,” and “the safety and welfare” of “individuals or the general public.”