

**Matter of Deraffele v State of New York Banking
Dept.**

2012 NY Slip Op 31887(U)

July 12, 2012

Supreme Court, New York County

Docket Number: 111951/2011

Judge: Paul G. Feinman

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. PAUL G. FEINMAN
Justice

PART 12

Index Number : 111951/2011
DERAFFELE, JOHN
vs.
NYS BANKING DEPARTMENT
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. 111951/2011

MOTION DATE _____

MOTION SEQ. NO. 001

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

**PETITION IS DECIDED IN ACCORDANCE WITH
THE ANNEXED DECISION, ORDER AND JUDGMENT.**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED

JUL 17 2012

NEW YORK
COUNTY CLERK'S OFFICE

[Signature], J.S.C.

Dated: 7/12/12

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

-----X

In the Matter of the Application of

JOHN DERAFFELE,

Petitioner,

Index Number: 111951/2011

Mot. Seq. No.: 001

-against-

**DECISION, ORDER AND
JUDGMENT**

STATE OF NEW YORK BANKING DEPT.,

Respondents.

-----X

FILED

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Papers considered in review of this petition:

Notice of petition, DeRaffele affidavit and annexed exhibits I - V
Notice of cross motion to dismiss, memorandum of law and Nochlin affirmation
and annexed exhibits A - E
DeRaffele reply affidavit
DeRaffele supplemental reply affidavit and annexed exhibit

Papers Numbered:

1 - 2
3 - 5

6
7

PAUL G. FEINMAN, J.:

In this proceeding brought pursuant to CPLR article 78, petitioner, John DeRaffele, seeks to annul respondent Banking Department's determination, dated August 4, 2011, which denied petitioner's application for a mortgage loan origination license. Respondent cross-moves to dismiss. Petitioner opposes the cross motion. For the reasons provided below, the petition is denied.

BACKGROUND

Petitioner was a licensed mortgage broker from January 1, 1989 until 2010, when he

surrendered his broker's license after deciding that he would rather work for a mortgage bank (Doc. 2, DeRaffele statement at ¶ 2). In 1989 petitioner plead guilty in the United States District Court, Eastern District of Pennsylvania, to conspiracy for aiding and abetting the filing of false tax returns. In October of 1990, petitioner received a permanent certificate of relief from disabilities from the New York State Board of Parole, "remov[ing] all legal bars and disabilities to employment, license and privilege except those pertaining to firearms ... and except the right to be eligible for public office" (Doc. 2, ex. II, Certificate of Relief). By letter dated March 5, 1996, petitioner received a Certificate of Good Conduct from the Board of Parole, which also "provide[d] relief from disabilities and bars to employment and licensing automatically imposed by New York State law as a result of your conviction, except the right to possess weapons and the right to hold public office" (Doc. 2, ex. III, March 5, 1996, letter).

In July of 2010, petitioner satisfied the educational requirements, passed the written test, paid the applicable fees and provided all of the information necessary in connection with his application to become a licensed Mortgage Loan Originator for 1-4 family residential properties in New York (Doc. 2, DeRaffele statement at ¶ 6). By letter dated August 4, 2011, petitioner's application was denied based on the Banking Department's analysis of petitioner's criminal history, conducted pursuant to Article 12-E of the Banking Law and Title V of the Federal Housing and Recovery Act of 2008, also known as the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (the "SAFE Act") (Doc. 2, ex. I, Aug. 4, 2011 letter). The letter advised petitioner that under both Article 12-E and the SAFE Act, he was barred from being a licensed Mortgage Loan Originator because he has "been convicted of, or pled guilty or *nolo contendere* to, a felony in a domestic, foreign, or military court: (i) during the seven-year period

preceding the date of your application for an MLO license; or (ii) at any time preceding such date, if such felony involved an act of fraud, dishonesty, or breach of trust, or money laundering” (*id.*).

After receiving notice of the denial of his license application, petitioner timely filed the instant petition within the four-month statute of limitations period.

ANALYSIS

“Judicial review of an administrative determination pursuant to CPLR article 78 is limited to inquiry into whether the agency acted arbitrarily or capriciously” (*Matter of City Svcs., Inc. v Nelman*, 77 AD3d 505, 507 [1st Dept 2010] [*internal citation omitted*]). The court is not permitted to “substitute its own judgment for that of the agency, particularly with respect to matters within its expertise” (*id.*; citing *Flacke v Onondaga Landfill Sys.*, 69 NY2d 355, 363 [1987]).

Petitioner seeks to annul the determination of the Banking Department based on the Certificate of Relief from Disabilities and Certificate of Good Conduct, which he claims allows him “to hold licenses in New York State” and the “right to work in New York State” (Doc. 2, DeRaffe statement at ¶ 9). Correction Law § 752 prohibits a state agency from unfairly discriminating against a person applying for a license based on his or her conviction for one or more criminal offenses. The statute applies to any application by any person for a license “except where a mandatory forfeiture, disability or bar to employment is imposed by law, and has not been removed by an executive pardon, certificate of relief from disabilities or certificate of good conduct” (Correction Law § 751). Correction Law § 753 sets forth eight factors that are to be considered by an agency in making a determination on an application for a license pursuant to

Correction Law § 752). While a certificate of good conduct creates a statutory presumption of rehabilitation, it does not establish prima facie petitioner's entitlement to a license (*Matter of Greenberg v Wrynn*, 86 AD3d 437, 437 [1st Dept 2011]; citing Correction Law § 753).

However, Banking Law § 599-e provides, “[n]otwithstanding any other law, the superintendent shall not issue a mortgage loan origination license unless he or she makes, at a minimum ...” certain findings including that “the applicant has not been convicted of, or pled guilty or nolo contendere to,” a felony either “(i) During the seven-year period preceding the date of the application for licensing; or (ii) At any time preceding such date of application, if such felony involved an act of fraud, dishonesty, or a breach of trust, or money laundering ...” (Banking Law § 599-e [1] [b] [i], [ii]). However, for purposes of that subdivision, “the superintendent may, in his or her discretion, disregard a conviction where the felon has been pardoned” (Banking Law § 599-e [1] [b] [i]). Correction Law § 753, ““a prior general statute,’ must ‘yield[] to [Banking Law § 599-e,] a later specific or special statute’” (*Matter of Rampolla v Banking Dept. of the State of N.Y.*, 93 AD3d 526, 527 [1st Dept 2012]; quoting *Matter of Niagara County v Power Auth. of State of N.Y.*, 82 AD3d 1597, 1601 [4th Dept 2011]).

In 1989, petitioner pled guilty to “Conspiracy - Aiding & Abetting Filing False Tax Returns” - a felony involving “an act of fraud, dishonesty, or a breach of trust ...” within the meaning Banking Law § 599-e [b] [ii]). “While petitioner was granted a Certificate of Relief from Disabilities automatically imposed by law by reason of his felony conviction, pursuant to Correction Law § 701, he has not been pardoned” (*Matter of Rampolla*, 93 AD3d at 527). Similarly, his Certificate of Good Conduct also is not a pardon. Therefore, the superintendent had no discretion to disregard petitioner's conviction and was required to deny his application

(*id.*). It follows that the determination of the Banking Department was not arbitrary or capricious. While there is no dispute that petitioner is rehabilitated and may be able to perform the functions required of a Mortgage Loan Originator without any risk to the public, the clear terms of the Banking Law and the relevant case law are binding on this court.

Accordingly, it is:

ORDERED and ADJUDGED that the petitioner's application pursuant to CPLR article 78 seeking an annulment of respondent's August 4, 2011 determination is denied and the petition is hereby dismissed.

This constitutes the decision, order and judgment of the court.

Dated: July 12, 2012

New York, New York

Saul G. Furman

J.S.C.

FILED

JUL 17 2012

(Deraffele_v_StateofNYBankDept_111951_2011_001_daz[art78_felony_Banklicense]) NEW YORK COUNTY CLERK'S OFFICE