

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

2012 NY Slip Op 31939(U)

July 5, 2012

Supreme Court, New York County

Docket Number: 103293/11

Judge: Paul Wooten

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

E
7/19/12

In the Matter of the Application of
FRANK SCALERA,
Petitioner,

INDEX NO. 103293/11

For a Judgement Pursuant to the Provisions of
Article 78 of the New York Civil Practice Law and Rules,

-against-

MOTION SEQ. NO. 001

THE NEW YORK CITY DEPARTMENT OF BUILDINGS,
Respondent.

RECEIVED

The following papers numbered 1 to 4 were read on this motion by petitioner for an order and judgement pursuant to Article 78 of the Civil Practice Law and Rules.

JUL 16 2012

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits (Memo)

Replying Affidavits (Reply Memo)

FILED

MOTION SUBMITTED
PAGES NUMBERED
NEW YORK COUNTY CLERK'S OFFICE

1
2,3
4

JUL 19 2012

Cross-Motion: Yes No

NEW YORK COUNTY CLERK'S OFFICE

This is an Article 78 proceeding brought by Frank Scalera (petitioner) on March 17, 2011, in which petitioner seeks an order reversing, annulling and setting aside the determination by the New York City Department of Buildings (respondent), dated December 8, 2010, to deny the petitioner a Master Plumber's License pursuant to the New York City Administrative Code (Administrative Code) § 26-146(a).¹ In denying petitioner's application, respondent concluded that the petitioner did not sufficiently demonstrate that he had obtained the requisite seven years of prior experience in the design and installation of plumbing systems under the direct and continuous supervision of a licenced Master Plumber (see Verified Petition,

¹ Administrative Code § 26-146 states in relevant part: "In addition to meeting the general qualifications prescribed in section 26-133 of this subchapter: a. all applicants for a master plumber certificate shall submit satisfactory proof establishing that the applicant: 1. has had at least seven years' prior experience in the design and installation of plumbing systems in the United States; or 2. has received a bachelor's degree in engineering or appropriate engineering technology from a college or university registered by the state department of education and has had at least three years prior experience in the design and installation of plumbing systems in the United States."

exhibit C).

Pursuant to their authority to investigate candidates for a license (see 55 RCNY 11-02[h]), and in reviewing petitioner's application and supporting documentation and his previous work experience, respondent discounted more than six years of the petitioner's alleged qualifying work experience. Respondent also expressed concern that the petitioner did not provide various material which was requested. In particular, respondent noted that petitioner failed to provide Union wage scale information necessary to interpret the petitioner's Social Security Earnings Statement (SSE), nor did he provide any contracts with any City or State authorities with whom he may have worked.

In his license application petitioner claimed to have performed plumbing work under the supervision of licensed master plumber Frank A. Marazzo (Marazzo) at F & V Mechanical Plumbing & Heating Corp. (F & V) from November 10, 1991 to June 1995. However, respondent only credited petitioner with eight months and two weeks of experience at F & V due to the minimal number of permits obtained by Marazzo between 1991 and 1994, even though petitioner stated that the work Marazzo performed for New York City and New York State agencies was "complex and time consuming" despite not having permits. Respondent also reviewed petitioner's SSE during this period and concluded that "his low wages for the trade indicated that he *may not* have been employed on a full time basis during that time" (Verified Petition, exhibit C). Moreover, respondent noted that petitioner failed to provide it with any contracts with any City or State authorities with whom he may have worked. Additionally, the letter submitted by William Kelly, dated February 28, 2008, only stated that petitioner was employed by F & V from 1990 to 1994.² Respondent also noted that petitioner submitted a letter stating that Marazzo had retired and could not be contacted.

² F & V has since changed its name to RailWorks Transit, Inc.

Petitioner also claimed to have worked at Domestic Plumbing & Heating (Domestic) during the period of February 20, 1998 to 2000 under the supervision of master plumber Sebastian Rendino (Rendino). However, respondent declined to credit the petitioner with any claimed work experience with Domestic. Respondent found that petitioner failed to demonstrate sufficient work in design and installation of plumbing systems at Domestic because Rendino only obtained 5 permits in 1999 and 2 in 1998, and also because a review of petitioner's SSE showed petitioner earned no wages under Domestic, which is contrary to petitioner's assertion that he was under their employ. Moreover, petitioner found that the letter submitted by Rendino, dated February 28, 2008, did not explain the absence of wages or sufficiently verify the three years of claimed work experience.

Petitioner now brings this Article 78 proceeding seeking to annul respondent's determination and to compel respondent to reconsider his application for a master plumber's license. In support of his petition, petitioner asserts that respondent's failure to issue his license was arbitrary and capricious. Petitioner argues that by misinterpreting the Administrative Code and creating qualifications regarding the amount of permits obtained and proof of wages, which are not mentioned in the Administrative Code, respondent is abusing its discretion afforded to it by statute.

In opposition the respondent asserts that petitioner's license application was denied because he failed to demonstrate that he completed seven years of experience in plumbing work, and in reaching this determination respondent did not read additional requirements into the Administrative Code. As such, respondent maintains that its determination was rational, reasonable, and supported by the administrative record and should be upheld by the Court.

STANDARD

The standard of review in this Article 78 proceeding is whether the respondent's

determination "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]; *see also Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 758 [1991]). Furthermore, the Court of Appeals has held "that the interpretation given to a regulation by the agency which promulgated it and is responsible for its administration is entitled to deference if that interpretation is not irrational or unreasonable" (*Matter of Gaines v New York State Div. of Hous. & Community Renewal*, 90 NY2d 545, 548-549 [1997]; *see also Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]; *Matter of West Vil. Assoc. v New York State Div. of Hous. & Community Renewal*, 277 AD2d 111, 112 [1st Dept 2000] [a rational and reasonable determination of an agency within its area of expertise is entitled to deference by the courts]). As such, a court "may not overturn an agency's decision merely because it would have reached a contrary conclusion" (*Matter of Sullivan County Harness Racing Assn. v Glasser*, 30 NY2d 269, 278 [1972]; *see also Matter of Verbalis v New York State Div. of Hous. & Community Renewal*, 1 AD3d 101 [1st Dept 2003]).

Moreover, an "[a]gency determination of a license application requires a certain amount of discretionary judgment-making which courts will not disturb absent a finding that such judgments were arbitrary or capricious" (*Matter of Montanez v City of N.Y. Dept. Of Bldgs.*, 8 Misc3d 405, 407 [Sup Ct NY County 2005]; *see Matter of Pell*, 34 NY2d at 231).

DISCUSSION

All parties agree that petitioner has met the general qualifications for a license pursuant to Administrative Code § 26-133 and that he passed the written test authorized under Administrative Code § 26-134. The dispute here is only whether respondent's determination that petitioner failed to adequately substantiate that he had at least seven years' prior experience in the design and installation of plumbing systems in the United States as required

by Administrative Code § 26-146(a), was proper.

The Court has considered the parties' submissions and for the reasons set forth below, the petition is granted and this matter is remanded back to the respondent for a determination consistent with this decision.

The Court concludes that while respondent's determination that petitioner lacked the necessary work experience for a master plumber's license was a discretionary judgment, it was arrived at in an arbitrary and unreasonable manner, such that it constitutes an abuse of discretion (*see Matter of Arrocha v Board of Educ. of City of N.Y.*, 93 NY2d 361, 363 [1999]). Specifically, respondent's refusal to credit petitioner for most of the time that he worked for F&V during 1991 to 1994, and for any of the time he worked at Domestic during 1998 to 2000, based upon the minimal number of permits issued to his supervising master plumbers was arbitrary and capricious. The Court recognizes that it is the responsibility of licensed master plumbers and employers to file appropriate work permits with the respondent for plumbing work. Thus, while the failure to file the appropriate work permits is a violation of the Administrative Code attributable to the business, it is irrational that petitioner should not get work credited to him when he worked on jobs that may not require the issuance of a permit. Moreover, it also seems irrational to punish petitioner, a license candidate, based on the failure of the employer/master plumber to meet their obligation to file for a permit. In particular, in this case, Marazzo from F & V is retired and no longer operating under the respondent's purview, and therefore has little reason or obligation to respond to its inquiries about the petitioner. Respondent's decision to not credit petitioner with work experience on the basis of the minimal number of permits obtained by his supervising master plumbers amounts to a new licensing requirement not authorized by the statute and cannot stand (*see Matter of Kreitzer v New York City Dept. Of Bldgs.*, 24 AD3d 374 [1st Dept 2005]; *Montanez, supra*).

CONCLUSION

For these reasons and upon the foregoing papers, it is,

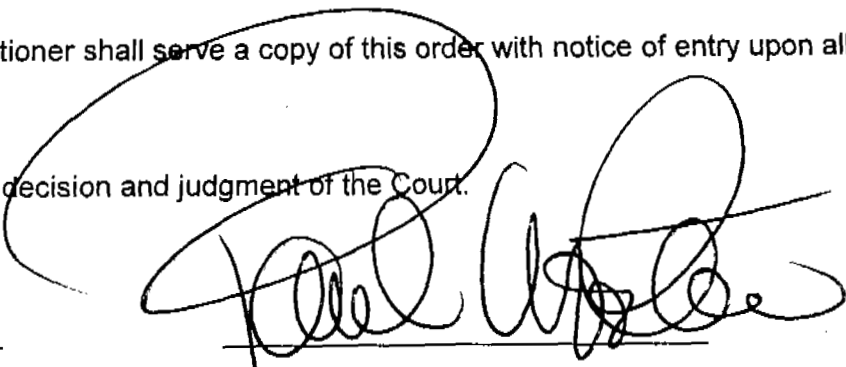
ORDERED that the petition is hereby granted and the determination of the New York City Department of Buildings is annulled; and it is further,

ORDERED that this matter is remanded for reconsideration by respondent in a manner consistent with this decision; and it is further,

ORDERED that petitioner shall serve a copy of this order with notice of entry upon all parties.

This constitutes the decision and judgment of the Court.

Dated: 7/5/12



PAUL WOOTEN , J.S.C.

- 1. Check one:
- 2. Check If appropriate:..... MOTION IS:
- 3. Check If appropriate:.....

<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
<input type="checkbox"/> GRANTED	<input type="checkbox"/> DENIED
<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/>
OTHER	
<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
<input type="checkbox"/> DO NOT POST REFERENCE	<input type="checkbox"/> FIDUCIARY APPOINTMENT

FILED

JUL 19 2012

NEW YORK
COUNTY CLERK'S OFFICE