

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

2012 NY Slip Op 32069(U)

July 17, 2012

Sup Ct, NY County

Docket Number: 100603/12

Judge: Geoffrey D. Wright

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: _____
Justice

PART 62

Index Number : 100603/2012
GORELIK, DMITRY
vs.
NYC DEPT. OF BUILDINGS
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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 *decided in*
accordance with the annexed written
decision.

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

FILED

AUG 07 2012

NEW YORK
COUNTY CLERK'S OFFICE

GEOFFREY D. WRIGHT
A.J.S.C., J.S.C.

Dated: 7-17-12

- 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 CITY OF NEW YORK
COUNTY OF NEW YORK: PART 62

-----X
In the Matter of the Application of
DMITRY GORELIK,

Petitioner,

Index No.: 100603/12

For a Judgment under and pursuant to
Article 78 of the CPLR

-against-

NEW YORK CITY DEPARTMENT OF BUILDINGS,
and THE NEW YORK CITY DEPARTMENT OF
CITYWIDE ADMINISTRATIVE SERVICES,
Respondents.

FILED

AUG 07 2012

NEW YORK
COUNTY CLERK'S OFFICE

----- X
RECITATION , AS REQUIRED BY CPLR 2219(A), of the papers considered in the review
of this Motion/Order pursuant to Article 78 to set decision.

PAPERS	NUMBERED
Notice of Petition and Affidavits Annexed.....	___ 1 ___
Order to Show Cause and Affidavits Annexed	_____
Answering Affidavits.....	___ 2 ___
Replying Affidavits.....	___ 3 ___
Exhibits.....	_____
Other.....memo of law.....	___ 4 ___

Petitioner moves, pursuant to Article 78 of the CPLR: (1) to reverse, annul and set aside the denial of petitioner's application for a Master Fire Suppression Piping Contractor's license; and (2) to direct respondents to issue said license.

BACKGROUND

On December 7, 2007, petitioner submitted an application for the License to respondents (together, DOB), the agency charged with issuing such licenses and with evaluating the fitness of applicants for the License. Petitioner took and passed the required examination for the License.

By letter dated September 29, 2010, DOB denied petitioner's application, quoting section 26-133 of the Administrative Code of the City of New York (Administrative Code) that an applicant "shall be of good moral character, and shall meet additional qualifications that may be prescribed for the particular license." Petition, Ex. B. DOB determined that, because petitioner pleaded guilty, on September 20, 2000, to Criminal Procedure Law § 200.30, Giving Unlawful Gratuities, stemming from an incident in which petitioner gave an undercover agent \$2,000.00 in cash to avoid being issued a notice for improperly installing eight water meters in a housing complex, his application would be denied. *Id.* DOB explained that Article 23-A, section 752 of the Correction Law provides that an application for a license shall be denied where there is a direct relationship between the applicant's criminal conviction and the specific license sought. DOB stated that the nature of petitioner's offense bears a direct relationship to his fitness and ability to perform the duties and responsibilities incident to the License, because his willingness to bribe an inspector to hide his own violations calls into question whether he would risk the safety of the public for his own convenience. *Id.* Further, DOB said that, even though the incident occurred in 2000, petitioner was 31 years of age at the time and, presumably, a responsible adult. *Id.* The letter also informed petitioner that he could submit information to document his rehabilitation in support of his application within 60 days from the date of the letter. *Id.*

On November 9, 2010, petitioner submitted a letter for reconsideration of his application. Petition, Ex. C. In response to this letter, DOB wrote back requesting that petitioner provide, in writing, a "detailed explanation, in writing, of the circumstances surrounding his arrest and subsequent guilty plea." Petition, Ex. D. On July 28, 2011, petitioner's counsel wrote back to DOB, challenging DOB's initial determination, and attaching an affidavit from petitioner explaining the circumstances surrounding his arrest and plea. Petition, Ex. E. On September 19, 2011, DOB rendered a final determination, denying petitioner's application, stating that petitioner "has not satisfied the requirement of good moral character." Petition, Ex. A.

On August 31, 2011, petitioner filed an order to show cause to compel DOB to produce all applications for licenses issued by DOB to applicants who had disclosed the conviction of a criminal offense, pursuant to the Freedom of Information Law, and also sought leave to amend the petition to challenge DOB's denial of the application. By order of the Hon. Donna Mills, on January 18, 2012, these motions were denied. The court notes that the instant petition was filed by petitioner one day later, on January 19, 2012. On March 21, 2012, Judge Mills confirmed her earlier denial of petitioner's requests, in response to petitioner's motion to renew and reargue. One month later, the instant petition was filed.

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Petitioner contends that DOB failed in its duty, pursuant to section 753 (2) of the New York State Correction Law, which states:

"In making a determination pursuant to section seven hundred fifty-two of this chapter, the public agency or private employer shall also give consideration to a certificate of relief from disabilities or a certificate of good conduct issued to the applicant, which certificate shall create a presumption of rehabilitation in regard to the offense or offenses specified therein."

Petitioner states that DOB failed in its duty to consider the presumption of rehabilitation afforded petitioner by his grant of a certificate of relief from disabilities. Petition, Ex. E.

In addition, petitioner maintains that other factors, such as the time that has elapsed since the offense, his age at the time of the offense, and the seriousness of the offense should all have been taken into account by DOB in its deliberations. Petitioner also reargues his request for the above-referenced documents, pursuant to the Freedom of Information Law, which has already been denied.

The court notes that, in its final determination, dated September 19, 2011, DOB lists all of the Correction Law factors and states that:

"[Petitioner]'s conviction for Giving Unlawful Gratuities bears a direct relationship to his fitness and ability to perform the duties and responsibilities of a LMFSPC. As a licensee, his interactions with Department and other government entities are expected to be truthful and reliable. [Petitioner]'s fire suppression work would frequently be subject to inspections by various agencies, and he and his employees would have frequent contact with Department personnel. [Petitioner]'s willingness to influence a DEP inspector by offering him gratuities calls into question whether he would risk the safety of the public in the future for his own convenience. Although the circumstances that led to this conviction occurred over ten years ago, the Department has a significant interest in licensing individuals who have professionalism and act with integrity and ethics, especially where the licensee

has the authority to install complex fire suppression systems. The acts that led to this conviction occurred when [petitioner] was twenty-eight years of age and a presumably a [sic] responsible adult who should have known that being involved in bribing a government official was not only imprudent but had consequences beyond relieving his payment of violations."

Petition, Ex. A.

In addition, this denial letter states that, among the information that DOB considered were petitioner's Certificate of Relief from Disabilities, letters of recommendation and petitioner's affidavit. *Id.*

In opposition to the instant petition, DOB asserts that its determination has a rational and reasonable basis, supported by the evidentiary record before it. In addition, DOB claims that petitioner cannot compel it to perform a discretionary act under Article 78 of the CPLR.

In reply, petitioner primarily reargues its position on the production of the documents that has already been twice denied.

DISCUSSION

It is well settled that "a court may not substitute its judgment for that of the board or body it reviews *unless* the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion [internal quotation marks and citation omitted] [emphasis in original]." *Matter of Pell v Board of Education of Union Free School District No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 232 (1974). The test is whether the action taken is justified or without foundation in fact. *Id.* at 231. "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts." *Id.*

The petition is denied.

"If the employer or agency considers all eight factors listed in section 753 (1), it need not in every case produce evidence to rebut the presumption of rehabilitation before denying a license or employment. In some cases, consideration of other factors such as severity of the criminal offense, the age of the offender at the time of the offenses, the passage of time between the offenses and

the application, and the nature of the license or employment sought can warrant denial of the license notwithstanding the absence of new evidence specifically addressed at overcoming the presumption of rehabilitation."

Matter of Bonacorsa v Van Lindt, 71 NY2d 605, 614 (1988)(license denied even though applicant had received a certificate of good conduct, was entitled to a presumption of rehabilitation and the fact that several years had elapsed from the time of the conviction).

In the case at bar, the denial letter from DOB lists all eight factors enumerated in the Correction Law, indicated the evidence that it considered, and specified the weight that it gave to those factors.

"A failure to take into consideration each of these factors [would] result[] in a failure to comply with the Correction Law's mandatory directive." *Matter of Acosta v New York City Department of Education*, 16 NY3d 309, 316 (2011). However, "[i]t is ... improper for the courts to 'engag[e] in essentially a re-weighing' of the Correction Law § 753 factors [internal citation omitted]." *Id.* at 318.

"The denial of petitioner's applications is supported by substantial evidence. The certificate of good conduct he received ... does not establish prima facie his entitlement to a license, but merely creates a presumption of rehabilitation. Moreover, the certificate is only one of eight factors to be considered pursuant to Correction Law § 753, and we find that respondent considered and properly balanced all the factors."

Matter of Greenberg v Wrynn, 86 AD3d 437, 437 (1st Dept 2011)(license denied even though conviction was 16 years old and evidence of recent good conduct and rehabilitation were presented).

Based on the foregoing, the court concludes that DOB did not violate appropriate procedures, because it did consider all of the Correction Law factors, and that its determination was not arbitrary or capricious, and has a rational basis.

Furthermore, the court agrees with respondent that petitioner may not seek mandamus to force DOB to perform a discretionary act, which the granting of a license certainly is.

"It is well settled that the remedy of mandamus is available to compel a

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governmental entity or officer to perform a ministerial duty, but does not lie to compel an act which involves an exercise of judgment or discretion [citation omitted]."

Matter of Brusco v Braun, 84 NY2d 674, 679 (1994).

"Mandamus is often characterized as an 'extraordinary remedy' that is available only in limited circumstances. Traditionally, the writ of mandamus is the relief invoked when a party seeks to compel performance by a governmental agency of a duty enjoined by law. A party seeking relief in the nature of mandamus must show a 'clear legal right' to the relief. However, the availability of mandamus to compel 'depends not on the applicant's substantive entitlement to prevail, but on the nature of the duty sought to be commanded—i.e., mandatory, non-discretionary action' [internal citations omitted]."

Matter of County of Fulton v State of New York, 76 NY2d 675, 678 (1990).

Simply stated, mandamus does not lie to enforce discretionary duties. *New York Civil Liberties Union v State of New York*, 4 NY3d 175 (2005). Nor may it be used as a vehicle for the substitution of the court's discretion for that of the administrative agency's. *Matter of Chessin v New York City Conciliation & Appeals Board*, 100 AD2d 297 (1st Dept 1984).

The Petition is denied.

Dated: July 17, 2012

FILED
C
GEOFFREY D. WRIGHT AUG 07 2012
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JUDGE GEOFFREY D. WRIGHT
NEW YORK
Acting Justice of the Supreme Court
COUNTY CLERK'S OFFICE