

<b>Mascarella v LiMandri</b>
2012 NY Slip Op 32207(U)
July 20, 2012
Supreme Court, New York County
Docket Number: 101324/2011
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK -- NEW YORK COUNTY

PRESENT: \_\_\_\_\_  
Justice

PART 46

James Mascarella

INDEX NO. 101324/11

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 1

MOTION CAL. NO. \_\_\_\_\_

Robert D. Limandri

The following papers, numbered 1 to 2 were read on this motion to/for vacate respondent's determination petition

PAPERS NUMBERED

1
2

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

Answering Affidavits -- Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered ~~that this motion~~ and adjudged that:  
The court grants the petition to the extent of vacating respondent's determination dated 1/5/11 and remanding the proceeding to the New York City Department of Buildings, pursuant to the accompanying decision. C.P.L.R. §§ 7803, 7806.

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).

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Dated: 7/20/12 \_\_\_\_\_ Limandri \_\_\_\_\_  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 46

JAMES MASCARELLA,

Petitioner

- against -

ROBERT D. LIMANDRI, as the  
Commissioner of the New York City  
Department of Buildings,

Respondent

Index No. 101324/2011

DECISION AND ORDER

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APPEARANCES:

For Petitioner

Robert J. La Reddola Esq.  
600 Old Country Road, Garden City, NY 11530

For Respondent

Amy Weinblatt, Assistant Corporation Counsel  
100 Church Street, New York, NY 10007

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Respondent petitioned in the New York City Office of Administrative Trials and Hearings (OATH) to revoke petitioner's Hoisting Machine Operator Class B Unlimited License on the grounds of poor moral character, N.Y.C. Admin. Code § 28-401.19(13), and failure to comply with a New York City Administrative Code provision or respondent's lawful rule, order, or other requirement. N.Y.C. Admin. Code § 28-401.19(7). The underlying premise for both grounds was petitioner's conviction of extortion under the federal Hobbs Act, 18 U.S.C. § 1951(a), upon his guilty plea September 27, 2004. After the OATH hearing

November 8, 2010, the Administrative Law Judge (ALJ), recommended a one year suspension of petitioner's license. In a final determination dated January 5, 2011, respondent revoked petitioner's license.

## II. APPLICABLE STANDARDS

An ALJ's determination after a hearing is entitled to significant weight. 80 Lafayette Assoc. v. Gibson, 59 A.D.3d 231, 233 (1st Dep't 2009); Albany Manor Inc. v. New York State Liquor Auth., 57 A.D.3d 142, 144 (1st Dep't 2008); Grossberg v. Christian, 245 A.D.2d 118 (1st Dep't 1997); Promesa, Inc. v. New York State Dept. of Health, 204 A.D.2d 179 (1st Dep't 1994).

Respondent may reverse the ALJ's determination only if substantial evidence supports respondent's contrary conclusion. 80 Lafayette Assoc. v. Gibson, 59 A.D.3d at 233; Mancini v. New York City Dept. of Env'tl. Protection, 26 A.D.3d 178, 179 (1st Dep't 2006); Promesa, Inc. v. New York State Dept. of Health, 204 A.D.2d 179.

The court may vacate a final determination following an administrative hearing if that "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." C.P.L.R. § 7803(3). This court may not rule on whether a determination following a hearing was unsupported by substantial evidence, but must transfer that question to the Appellate Division. C.P.L.R. §§ 7803(4), 7804(g). Before transferring the proceeding, however, this court must rule out the other grounds

for vacating or remanding the administrative decision. C.P.L.R. §§ 7803(3), 7804(g); Earl v. Turner, 303 A.D.2d 282 (1st Dep't 2003). The record here sets forth grounds to vacate respondent's determination independent of the substantial evidence question.

### III. VIOLATION OF LAWFUL PROCEDURE

Respondent may revoke or suspend petitioner's license based on his lack of good moral character due to a prior conviction for a crime where it is directly related to the license and work for which the license is required or where continuing the license poses an unreasonable risk to the safety of persons or property. N.Y. Correct. Law § 752. New York Correction Law § 753(1) lists the factors a public agency must consider when determining whether to continue a license in light of the licensee's past criminal conviction. Duffy v. LiMandri, 93 A.D.3d 411 (1st Dep't 2012); Inglese v. LiMandri, 89 A.D.3d 604, 605 (1st Dep't 2011).

Although the ALJ fully considered those factors in reaching his determination, respondent's revocation determination merely recites that those factors support his determination and specifically addresses only a few selected factors. In particular, respondent failed to address the length of time since petitioner's offense in 2001. N.Y. Correct. Law § 753(1)(d). During that time, as New York City Department of Buildings (DOB) Director of Licensing Aisha Norflett testified, DOB, in 2008, renewed petitioner's license after petitioner had disclosed his prior conviction. Respondent also failed to address the uncontroverted evidence of petitioner's exemplary conduct

relevant to the licensed work. N.Y. Correct. Law § 753(1)(g). At the OATH hearing, petitioner presented two witnesses, who testified that petitioner was well known in the work force as a safe hoist operator, that he was a trustworthy employee, and that his criminal conviction did not affect his ability to perform the work.

#### IV. RESPONDENT'S DISQUALIFICATION

Petitioner complains that respondent initiated the proceedings to revoke his license and then became the adjudicator of those proceedings. Respondent minimizes his involvement in the revocation proceedings as indirect, emphasizing he was not a witness. He maintains that nothing in the record demonstrates how his fairness or impartiality was undermined.

The record nonetheless shows that respondent initiated the proceedings to revoke petitioner's license at OATH. While respondent himself did not prosecute the charges, a DOB attorney did so on respondent's behalf. As the advocate for revocation of petitioner's license, respondent is disqualified from adjudicating that claim. Beer Garden v. New York State Liq. Auth., 79 N.Y.2d 266, 278 (1992); Rosenblum-Wertheim v. New York State Div. of Human Rights, 213 A.D.2d 231, 232 (1st Dep't 1995); State Div. of Human Rights v. Dorik's Au Natural Rest., 204 A.D.2d 163, 164 (1st Dep't 1994). Serving as both prosecutor and adjudicator presents at minimum an appearance of unfairness or impartiality that requires recusal. General Motors Corp.-Delco Prods. Div. v. Rosa, 82 N.Y.2d 183, 188 (1993); Beer Garden v.

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New York State Lig. Auth., 79 N.Y.2d at 279; State Div. of Human Rights v. Dorik's Au Natural Rest., 204 A.D.2d 163. Respondent has not shown that his disqualification will prevent the hearing and determination of the revocation proceeding against petitioner. General Motors Corp.-Delco Prods. Div. v. Rosa, 82 N.Y.2d at 188. See Baker v. Poughkeepsie City School Dist., 18 N.Y.3d 714, 718 (2012).

V. CONCLUSION

Since respondent's dual participation disqualified him from making the final determination regarding petitioner's license revocation, the court grants the petition to the extent of annulling respondent's determination and remanding the proceeding to DOB for a new final determination by an impartial decisionmaker, based on the weight of the ALJ's determination. Corning Glass Works v. Ovsanik, 84 N.Y.2d 619, 626 (1994); General Motors Corp.-Delco Prods. Div. v. Rosa, 82 N.Y.2d at 190; Deluxe Homes of Pa. v. State of New York Div. of Human Rights, 205 A.D.2d 394 (1st Dep't 1994). This decision constitutes the court's order and judgment granting the petition to that extent, otherwise denying the petition, and dismissing this proceeding. C.P.L.R. §§ 7803(3), 7806.

DATED: July 20, 2012



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LUCY BILLINGS, J.S.C.

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**LUCY BILLINGS**  
J.S.C.