

**Matter of Davies v New York City Dept. of Bldgs.**

2012 NY Slip Op 32630(U)

October 5, 2012

Supreme Court, New York County

Docket Number: 114100/11

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN  
*Justice*

PART 7

In the Matter of the Application of  
**KEVIN DAVIES,**

Petitioner,

INDEX NO. 114100/11

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

MOTION SEQ. NO. 001

-against-

**THE NEW YORK CITY DEPARTMENT  
OF BUILDINGS,**

Respondent.

**FILED**

OCT 16 2012

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.

NEW YORK  
COUNTY CLERK'S OFFICE

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

PAPERS NUMBERED

1

Answering Affidavits — Exhibits (Memo)

2, 3

Replying Affidavits (Reply Memo)

4

Cross-Motion:  Yes  No

In this Article 78 proceeding, Kevin Davies (petitioner), seeks a judgment annulling the August 19, 2011 determination by respondent The New York City Department of Buildings (DOB), which denied petitioner's renewal application for his Stationary Engineer license and directing the DOB to reconsider petitioner's renewal application. Petitioner seeks a declaration that he is eligible for his renewal, and a declaration that respondents the DOB, failed to perform a duty enjoined upon them by the New York State Correction Law §§ 752 and 753.

BACKGROUND

Petitioner has been a licensed stationary engineer since 1996. On June 1, 1998, petitioner pled guilty to a violation of the New York Penal Code §175.30, Offering a False instrument for Filing, a class "A" Misdemeanor, wherein he falsely certified that he had successfully completed a refresher course in order to renew his Commercial Pesticide Applicator license (see Verified Petition ¶ 3). This resulted in a sentence of a Conditional

Discharge and a \$500.00 fine (see Verified Petition, exhibit C).

In 2003, petitioner was employed by the Department of Education (DOE) as a Provisional Custodial Engineer for Public School 131, and his duties consisted of, among other things, custodial upkeep and maintenance of the boiler system. He possessed a valid license for High Pressure Operating Engineer (Stationary Engineer license). DOB states in its opposition that in 2003, the New York State Attorney General and the Special Commissioner of Investigation for the New York City School System commenced a joint investigation which revealed that school custodians repeatedly rigged bids and received kickbacks for contracts to clean windows from 1996 to 2001 (see Memorandum of Law in Opposition, pg. 6). Petitioner was one of more than seventeen custodians charged in connection with filing false expense reports in connection with hiring outside contractors without following the proper procedure for soliciting three independent bids (*id.*). On June 10, 2003, he pled guilty to the Class "A" Misdemeanor of Offering a False Instrument for Filing in the Third Degree, wherein petitioner admitted to filing a false expense report and supporting documentation in an effort to conceal his failure to comply with DOE bidding procedures (*id.*). As part of his plea agreement, petitioner received a one year Conditional Discharge, paid a \$4,000.00 fine, was forced to resign from his position and was permanently barred from working for the DOE (*id.* at pg. 7, Verified Petition ¶ 4). This was petitioner's second conviction while serving as a licensed stationary engineer. As part of the plea agreements, he was provided with a Certificate of Relief from Civil Disabilities for both crimes (see Verified Petition, exhibit D).

From May 2004 through May 2010, petitioner claims he repeatedly and successfully renewed his engineer's license, however his April 19, 2011 renewal application was denied (see Verified Petition ¶ 5). As part of its investigation of petitioner's license renewal application the DOB informed petitioner that it needed additional information, specifically a copy of documentation surrounding his 1998 and 2003 guilty pleas to offering False Instruments for

Filing as well as evidence of his rehabilitation. Petitioner responded in writing on June 16, 2011, and provided the required additional information and documentation to the DOB. On August 19, 2011, the DOB denied petitioner's renewal application, finding that he did not meet the requirements of the New York City Administrative Code (Admin Code) § 28-401.12. Specifically, in reaching its determination the DOB relied upon the grounds for denial listed in Admin Code § 28-401.19(12) and (13) which state: "(12) Conviction of a criminal offense where the underlying act arises out of the individual's professional dealing's with the city or government entity; [and] (13) Poor moral character that adversely reflects on his or her fitness to conduct work regulated by this code" (Verified Answer, exhibit I). On November 10, 2011, the DOB denied petitioner's request for reconsideration.

DISCUSSION

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).

Article 23-A encompasses sections 750-755 of the Correction Law. Section 752 prohibits the unfair discrimination against persons previously convicted of criminal offenses who are applying for a license or employment, and states the following:

No application for any license or employment, and no employment or license held by an individual, to which the provisions of this article are applicable, shall be denied or acted upon adversely by reason of the individual's having been previously convicted of one or more criminal offenses, or by reason of a finding of lack of "good moral character" when such finding is based upon the fact that the individual has previously been convicted of one or more criminal offenses, unless:

- (1) there is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought or held by the individual; or
- (2) the issuance or continuation of the license or the granting or continuation of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.

Section 753(1) of the Correction Law sets forth factors to be considered when denying or approving a license or job application for any individual with a criminal conviction. The factors are:

- (a) The public policy of this state, as expressed in this act, to encourage the licensure of persons previously convicted of one or more criminal offenses;
- (b) The specific duties and responsibilities necessarily related to the license sought or held by the person;
- (c) The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or

- ability to perform one or more such duties or responsibilities.
- (d) The time which has elapsed since the occurrence of the criminal offense or offenses.
- (e) The age of the person at the time of occurrence of the criminal offense or offenses.
- (f) The seriousness of the offense or offenses.
- (g) Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct.
- (h) The legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public.

Section 753(2) of the Correction Law also states the following:

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.

As set forth in Correction Law § 701, a Certificate of Relief is issued to eligible offenders so that they are not automatically barred from employment based on the conviction. Section 701(1) states the following, in pertinent part:

A certificate of relief from disabilities may be granted as provided in this article to relieve an eligible offender of any forfeiture or disability; or to remove any bar to his employment, automatically imposed by law by reason of his conviction of the crime or of the offense specified therein.

Section 701(3) of the Correction Law explains that the Certificate of Relief does not prevent any "judicial, administrative, licensing or other body, board or authority from relying upon the conviction specified therein as the basis for the exercise of its discretionary power to suspend, revoke, refuse to issue or refuse to renew any license, permit or other authority or privilege "

The DOB, among other things, approves or denies initial and renewal license applications for Stationary Engineers. According to Admin Code § 28-401.12, the DOB "may, following notice and an opportunity to be heard, refuse to renew a license or certificate of

competence on any grounds on the basis of which it could deny, suspend or revoke such license." The DOB may suspend or revoke a license if the applicant demonstrates "[p]oor moral character that adversely reflects on his or her fitness to conduct work regulated by this code" (Admin Code § 28-401.19[13]).

As set forth below, the Court finds that the DOB's decision dated August 19, 2011, which denied petitioner's application for renewal of his Stationary Engineer license was rational and should be upheld. After receiving and reviewing petitioner's written explanation regarding his two convictions, dated June 1, 2011, along with the other supporting documentation submitted by petitioner, the DOB decided that petitioner's convictions were related to "underlying acts arising out of [his] . . . professional dealings with the city or governmental entity" and showed "poor moral character" as it relates to his Stationary Engineer license (Verified Answer, exhibit I). The DOB stated that after a review the letters of recommendation as well as the other items in petitioner's application, despite the other positive indicators in his record, petitioner has not satisfied the requirement of good moral character and did not present sufficient evidence of rehabilitation.

The DOB also listed all the factors from Correction Law § 753, which an agency must take into consideration when making a determination concerning a previous conviction. One of the factors includes the bearing, if any, the conviction will have on the applicant's fitness to perform the job duties. After reviewing its own regulations set forth in Admin Code § 28-401.19(12) and (13), and also those of the Corrections Law, the DOB explained to petitioner that his ability to provide truthful and accurate records of boiler activity are in question. The DOB noted that petitioner was already a responsible adult, thirty-four years old and thirty-nine years old, when his convictions occurred and he should not have engaged in such conduct. As such, the DOB's explanation and decision for its denial was rational and reasonable and will not be overturned.

Petitioner argues that the DOB's decision to deny his license must be overturned as he was deprived of his procedural due process as required by the Fourteenth Amendment and Admin Code § 28-401.12 (see Verified Petition ¶¶ 11, 12). Petitioner also claims that the DOB did not act in good faith when it concluded that petitioner did not present sufficient evidence of rehabilitation given his submission of a certificate of relief from civil disabilities and the presumption such certificate creates pursuant to Correction law § 753(2) (see Verified Petition). Petitioner also notes that he disclosed his prior convictions starting with his May 2009 license renewal, pursuant to an amended New York City Construction Code which went into effect July 1, 2008 which contained a new requirement that applicants for licenses must disclose prior convictions, and each subsequent renewal was granted (*id.* ¶ 5).

However, the Court finds that petitioner had an opportunity to be heard in that he explained his convictions by letter prior to the denial of his application, dated June 1, 2011, and submitted additional documentation, including letters of recommendation from previous employers. The record indicates that the DOB reviewed this material yet still denied petitioner's application. Further, the DOB delineated every factor of Article 23 of the Correction Law in its denial. The DOB concluded that even though the circumstances relating to petitioner's most recent conviction occurred over ten years ago, petitioner had not established sufficient evidence of rehabilitation and his "conduct also clearly stemmed directly from the position of trust and authority [he was] given by the city." (Verified Answer, Exhibit I at p. 3).

"[T]he presumption of rehabilitation does not preclude [respondents] from considering any of the other seven factors, unrelated to rehabilitation, including prior convictions in the context of the license or employment being sought" (*Matter of Arrocha v Board of Educ. of City of N.Y.*, 93 NY2d 361, 366 [1999]). Although Correction Law § 752 prohibits unfair discrimination against a convicted person, a license application can still be denied if there is a direct correlation between the prior conviction and the license sought. Accordingly, the Court



finds that the DOB reasonably weighed the factors set forth in the Correction Law and the Court will not "reweigh" the factors.

CONCLUSION

Accordingly, it is hereby

ORDERED that the petition is denied and the proceeding is dismissed without costs or disbursements to the respondent; and it is further,

ORDERED that counsel for respondent is directed to serve a copy of this Order with Notice of Entry upon petitioner and upon the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 10/5/12

Enter: [Signature] PAUL WOOTEN, J.S.C.

Check one: [X] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION
Check if appropriate: [ ] DO NOT POST [ ] REFERENCE

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

PRESENT: HON. PAUL WOOTEN  
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BACKGROUND

Petitioner has been a licensed stationary engineer since 1996. On June 1, 1998, petitioner pled guilty to a violation of the New York Penal Code §175.30, Offering a False instrument for Filing, a class "A" Misdemeanor, wherein he falsely certified that he had successfully completed a refresher course in order to renew his Commercial Pesticide Applicator license (see Verified Petition ¶ 3). This resulted in a sentence of a Conditional

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (see *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (see *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

#### Premises Liability

Generally, a landowner must act as a reasonably prudent person in maintaining its property in a reasonably safe condition under all the circumstances, including the likelihood of injury, the potential seriousness of injury and the burden of avoiding the risk (see *Peralta v Henriquez*, 100 NY2d 139, 144 [2003]). Additionally, a party must be aware of the alleged defective or dangerous condition, either through having created it, actual knowledge of the condition or constructive notice of it through the defect's visibility for a sufficient amount of time prior to the accident to enable a defendant to discover and remedy it (see *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]).

#### Landlord's Duty-Abutting Sidewalk

"[A]n owner ... [of a building] has a statutory nondelegable duty to maintain the sidewalk abutting its premises" (*Spector v Cushman & Wakefield, Inc.*, 87 AD3d 422, 423 [1st Dept 2011]; see also *Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 519-521 [2008]; *Cook v Consolidated Edison Co. of NY, Inc.*, 51 AD3d 447, 448 [1st Dept 2008]).

#### Contract Interpretation

A lease is a contract and, where provisions of a lease are clear and unambiguous, they should be given their plain and ordinary meaning (see *United States Fid. & Guar. Co. v Annunziata*, 67 NY2d 229, 232 [1986]). While ambiguities are construed against the drafter, the court should not disregard the plain meaning to create an ambiguity, since this improperly

Discharge and a \$500.00 fine (see Verified Petition, exhibit C).

In 2003, petitioner was employed by the Department of Education (DOE) as a Provisional Custodial Engineer for Public School 131, and his duties consisted of, among other things, custodial upkeep and maintenance of the boiler system. He possessed a valid license for High Pressure Operating Engineer (Stationary Engineer license). DOB states in its opposition that in 2003, the New York State Attorney General and the Special Commissioner of Investigation for the New York City School System commenced a joint investigation which revealed that school custodians repeatedly rigged bids and received kickbacks for contracts to clean windows from 1996 to 2001 (see Memorandum of Law in Opposition, pg. 6). Petitioner was one of more than seventeen custodians charged in connection with filing false expense reports in connection with hiring outside contractors without following the proper procedure for soliciting three independent bids (*id.*). On June 10, 2003, he pled guilty to the Class "A" Misdemeanor of Offering a False Instrument for Filing in the Third Degree, wherein petitioner admitted to filing a false expense report and supporting documentation in an effort to conceal his failure to comply with DOE bidding procedures (*id.*). As part of his plea agreement, petitioner received a one year Conditional Discharge, paid a \$4,000.00 fine, was forced to resign from his position and was permanently barred from working for the DOE (*id.* at pg. 7; Verified Petition ¶ 4). This was petitioner's second conviction while serving as a licensed stationary engineer. As part of the plea agreements, he was provided with a Certificate of Relief from Civil Disabilities for both crimes (see Verified Petition, exhibit D).

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#### DISCUSSION

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

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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).

Article 23-A encompasses sections 750–755 of the Correction Law. Section 752 prohibits the unfair discrimination against persons previously convicted of criminal offenses who are applying for a license or employment, and states the following:

No application for any license or employment, and no employment or license held by an individual, to which the provisions of this article are applicable, shall be denied or acted upon adversely by reason of the individual's having been previously convicted of one or more criminal offenses, or by reason of a finding of lack of "good moral character" when such finding is based upon the fact that the individual has previously been convicted of one or more criminal offenses, unless:

- (1) there is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought or held by the individual; or
- (2) the issuance or continuation of the license or the granting or continuation of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.

Section 753(1) of the Correction Law sets forth factors to be considered when denying or approving a license or job application for any individual with a criminal conviction. The factors are:

- (a) The public policy of this state, as expressed in this act, to encourage the licensure... of persons previously convicted of one or more criminal offenses.
- (b) The specific duties and responsibilities necessarily related to the license ... sought or held by the person.
- (c) The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or

ability to perform one or more such duties or responsibilities.

(d) The time which has elapsed since the occurrence of the criminal offense or offenses.

(e) The age of the person at the time of occurrence of the criminal offense or offenses.

(f) The seriousness of the offense or offenses.

(g) Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct.

(h) The legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public.

Section 753(2) of the Correction Law also states the following:

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.

As set forth in Correction Law § 701, a Certificate of Relief is issued to eligible offenders so that they are not automatically barred from employment based on the conviction. Section 701(1) states the following, in pertinent part:

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Section 701(3) of the Correction Law explains that the Certificate of Relief does not prevent any "judicial, administrative, licensing or other body, board or authority from relying upon the conviction specified therein as the basis for the exercise of its discretionary power to suspend, revoke, refuse to issue or refuse to renew any license, permit or other authority or privilege."

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As set forth below, the Court finds that the DOB's decision dated August 19, 2011, which denied petitioner's application for renewal of his Stationary Engineer license was rational and should be upheld. After receiving and reviewing petitioner's written explanation regarding his two convictions, dated June 1, 2011, along with the other supporting documentation submitted by petitioner, the DOB decided that petitioner's convictions were related to "underlying acts arising out of [his] ... professional dealings with the city or governmental entity" and showed "poor moral character" as it relates to his Stationary Engineer license (Verified Answer, exhibit I). The DOB stated that after a review the letters of recommendation as well as the other items in petitioner's application, despite the other positive indicators in his record, petitioner has not satisfied the requirement of good moral character and did not present sufficient evidence of rehabilitation.

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Petitioner argues that the DOB's decision to deny his license must be overturned as he was deprived of his procedural due process as required by the Fourteenth Amendment and Admin Code § 28-401.12 (see Verified Petition ¶¶ 11, 12). Petitioner also claims that the DOB did not act in good faith when it concluded that petitioner did not present sufficient evidence of rehabilitation given his submission of a certificate of relief from civil disabilities and the presumption such certificate creates pursuant to Correction Law § 753(2) (see Verified Petition). Petitioner also notes that he disclosed his prior convictions starting with his May 2009 license renewal, pursuant to an amended New York City Construction Code which went into effect July 1, 2008 which contained a new requirement that applicants for licenses must disclose prior convictions, and each subsequent renewal was granted (*id.* ¶ 5).

However, the Court finds that petitioner had an opportunity to be heard in that he explained his convictions by letter prior to the denial of his application, dated June 1, 2011, and submitted additional documentation, including letters of recommendation from previous employers. The record indicates that the DOB reviewed this material yet still denied petitioner's application. Further, the DOB delineated every factor of Article 23 of the Correction Law in its denial. The DOB concluded that even though the circumstances relating to petitioner's most recent conviction occurred over ten years ago, petitioner had not established sufficient evidence of rehabilitation and his "conduct also clearly stemmed directly from the position of trust and authority [he was] given by the city" (Verified Answer, Exhibit I at p. 3).

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finds that the DOB reasonably weighed the factors set forth in the Correction Law and the Court will not "reweigh" the factors.

CONCLUSION

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ORDERED that counsel for respondent is directed to serve a copy of this Order with Notice of Entry upon petitioner and upon the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

FILED

Dated: 10/5/12

OCT 16 2012

Enter:

*Paul Wooten*  
PAUL WOOTEN, J.S.C.

NEW YORK  
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