Matter of Moore v City of New York
2017 NY Slip Op 30897(U)
May 4, 2017
Supreme Court, New York County
Docket Number: 151423/2016
Judge: Nancy M. Bannon
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42
----------X

In the Matter of

GREGORY MOORE, Index No. 151423/2016

Petitioner

v

DECISION AND ORDER

CITY OF NEW YORK and NEW YORK CITY DEPARTMENT OF CORRECTION

Respondents. MOT SEQ 001
----------X

NANCY M. BANNON, J.:

I. INTRODUCTION

Gregory Moore (the petitioner) petitions pursuant to CPLR article 78 to review a determination of the New York City Department of Correction (DOC) dated November 20, 2015, denying his administrative appeal from a decision dated November 2, 2015, made without a hearing, revoking a security license granting him access to detention facilities. The City and the DOC (together the respondents) answer the petition, denying all substantive allegations, and submit the administrative return with the answer. Inasmuch as the determination dated November 20, 2015, was arbitrary and capricious and affected by an error of law, the petition is granted, and the determination dated November 20, 2015, is vacated and annulled.

II. BACKGROUND

From 1989 to 2007 the petitioner was employed as a state-credentialed alcoholism and substance abuse counselor by several drug and alcohol rehabilitation facilities and counseling providers. In July 2007, the petitioner was hired as a counselor by Corizon Correctional Health Care (Corizon), which, pursuant to a contract with the DOC, provided counseling services to inmates detained at Rikers Island. After the petitioner authorized the respondents to perform a background check upon him, he was granted a security license in July 2007 by the DOC, affording him access to inmates at Rikers Island for the purpose of providing them with counseling services. As a consequence of an investigation by the New York City Department of Investigation into Corizon's hiring practices, and its purportedly insufficient vetting of the criminal histories of job applicants who ultimately obtained security licenses from the DOC, the DOC began reviewing those histories. In July 2015, the petitioner resubmitted his fingerprints to the DOC to permit it to conduct a criminal background check. On November 2, 2015, the DOC, without a hearing, revoked the petitioner's security license after its investigation revealed that, on June 24, 1980, he had been convicted of one count of burglary in the third degree, a class D felony, for which he was sentenced to a definite term of confinement of 60 days, plus 5 years of postrelease supervision.

The petitioner's criminal record reveals that, on June 7, 1985, the Supreme Court issued him a Certificate of Relief from Disabilities, which recites that it was issued so as to "[r]elieve the holder of all disabilities and bars to employment." The petitioner appealed the revocation of his security license to a DOC appeal board which, on November 20, 2015, affirmed the initial revocation.

The petitioner contends that the DOC's determination was arbitrary and capricious and affected by an error of law since it was rendered in the absence of any consideration of the factors enumerated in Correction Law §§ 752 and 753, which constrain a local correction department's discretion to deny or revoke employment or a license based on the criminal history of an applicant, employee, or licensee.

The respondents counter that they considered at least some of the statutory factors, even though they were not required to do so. They further argue that, in any event, the petitioner, as a licensee of a DOC contractor, is a "member" of a "law enforcement agency" within the meaning of Correction Law § 750, and was consequently not an "employee" subject to the protections afforded by Correction Law §§ 752 and 753. The respondents thus contend that they were not required to engage in the inquiry otherwise required by those provisions, and their determination to revoke the petitioner's security license based solely on his

1980 conviction was rational, not arbitrary and capricious, and not unlawful.

III. DISCUSSION

A. STANDARD AND SCOPE OF REVIEW

Where, as here, an agency renders a determination, but a trial-type hearing is not required by law, that determination must be confirmed by reviewing court unless it was arbitrary and capricious or affected by an error of law. See CPLR 7803(3); Matter of Resto v State of N.Y., Dept. of Motor Vehs., 135 AD3d 772 (2nd Dept. 2016). A determination is arbitrary and capricious where is not rationally based, or has no support in the record. See Matter of Gorelik v New York City Dept. of Bldgs., 128 AD3d 624 (1st Dept. 2015). A determination is also arbitrary and capricious where the decision-making agency fails to consider all of the factors it is required by statute to consider and weigh. See Matter of Kaufman v Incorporated Vil. of Kings Point, 52 AD3d 604 (2nd Dept. 2008).

Judicial review of an administrative determination is limited to the record made before the agency, and proof outside the administrative record should not be considered. See Matter of Concetta T. Cerame Irrevocable Fam. Trust v Town of Perinton Zoning Bd. of Appeals, 6 AD3d 1091 (4th Dept. 2004); Matter of City Servs., Inc. v Neiman, 77 AD3d 505 (1st Dept. 2010); Matter

of Piasecki v. Department of Social Servs., 225 AD2d 310 (1st Dept. 1996). An administrative agency may not rely on post-hoc rationalizations that do not appear on the face of the administrative record in order to explain determinations made on other grounds. See Matter of L&M Bus Corp. v New York City Dept. of Educ., 71 AD3d 127 (1st Dept. 2009).

B. CORRECTION LAW §§ 752 and 753

Correction Law § 752 provides that:

> "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."

Correction Law § 753, entitled "Factors to be considered concerning a previous criminal conviction; presumption," provides that:

"1. In making a determination pursuant to section seven hundred fifty-two of this chapter, the public agency or private employer shall consider the following factors:

"(a) The public policy of this state, as expressed in this act, to encourage the licensure and employment of persons previously convicted of one or more criminal offenses.

"(b) The specific duties and responsibilities necessarily related to the license or employment 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.

"2. 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."

See generally Matter of Dempsey v New York City Dept. of Educ., 25 NY3d 291 (2015); cf. Executive Law § 296(15) (proscribing

discrimination in employment based on prior criminal conviction unrelated to the requirements of employment); Admin. Code of City of N.Y. § 8-107(10) (same).

For the purpose of delineating the class of persons who are protected by Correction Law §§ 752 and 753, Correction Law § 750 defines the term "employment" to include "any occupation, vocation or employment, or any form of vocational or educational training. Provided, however, that 'employment' shall not, for the purposes of this article, include membership in any law enforcement agency." Consequently, an employer may take adverse employment action against a "member" of a "law enforcement agency" based on his or her criminal history without taking into account the factors enumerated in Correction Law §§ 752 and 753.

The Legislature did not expressly define the terms "membership" or "law enforcement agency" in article 23-A of the Correction Law. Research has revealed no appellate authority as to whether a licensee employed by a contractor of a law enforcement agency is a "member" of that law enforcement agency within the meaning of article 23-A, and the respondents have not cited to any. Nonetheless, two justices of the Supreme Court recently rendered determinations in proceedings commenced by Corizon employees that are virtually identical to the instant proceeding, and they addressed that very issue. The Justices, however, reached diametrically opposed legal conclusions as to

whether a Corizon employee whose security license was revoked by the DOC, based on a recent criminal background check, was a member of a law enforcement agency, and hence beyond the protection of Correction Law §§ 752 and 753.

In Matter of Graves v City of New York (53 Misc 3d 895 [Sup Ct, N.Y. County 2016]), the court concluded that a Corizon employee who was issued a security license by the DOC was a member of a law enforcement agency, and thus not protected by Correction Law §§ 752 and 753. In that case, the court premised its conclusion on the decisions in Belgrave v City of New York (137 AD3d 439 [1st Dept. 2016]) and Little v County of Westchester (36 AD3d 616 [2nd Dept. 2007]). In Belgrave, the New York City Police Department (NYPD) denied an application for civilian employment as a police communications technician on the ground that the applicant had a prior criminal conviction. The Appellate Division, First Department, concluded that employment by a police department, even as a civilian, constituted membership in a law enforcement agency, and that an applicant for such a position was not protected by Correction Law §§ 752 and 753. In Little, the Westchester County Commissioner of Correction denied an application for employment as a correction officer based on the applicant's prior criminal record. The Appellate Division, Second Department, held that employment as a uniformed officer by a local correction department constituted

membership in a law enforcement agency, and that an applicant for that position was not covered by Correction Law §§ 752 and 753. The Supreme Court, in denying Graves's petition, reasoned that "[a]lthough petitioner did not seek employment with DOC, petitioner's application for a 'license' to work within the confines of the DOC facilities render [sic] him an applicant for 'membership' within DOC." Matter of Graves v City of New York, supra, at 905.

In Matter of Dudley v City of New York (2017 Slip Op 27129 [Sup Ct, N.Y. County, Apr. 19, 2017]), the court concluded that a Corizon employee who was issued a security license by the DOC was not a member of a law enforcement agency and, hence, was protected by Correction Law §§ 752 and 753. The court in Dudley reasoned that Belgrave pertained solely to actual, direct civilian employment by a law enforcement agency, and that Little involved a law enforcement agency's broad discretion in hiring uniformed law enforcement officers. The Dudley court expressly rejected the reasoning underpinning Graves, explaining that whether

> "the license would permit [Dudley] to work in a correctional facility is irrelevant under the statutory scheme that, as noted supra, prominently distinguishes between licenses and employment. As the inclusion of an exemption for one category within a statutory scheme, and the omission of the exemption for a different category reflect a deliberate legislative choice, the exemption contained within [Correction Law] article 23-A must pertain to employment or applications for employment only, and not to licenses." Matter of

Dudley v City of New York, supra, at *5.

It further reasoned that

> "Had the Legislature intended that employment and membership in a law enforcement agency include the grant of access to a facility owned or managed by a law enforcement agency, or that the protections of article 23-A not extend to one with access to or working at a facility owned or managed by a law enforcement agency, regardless of whether the applicant seeks a license or employment, it could have enacted such an exemption, along with a provision that one seeking a license for access to or working at a law enforcement facility or a license issued by a law enforcement agency is not protected by article 23-A. It did not do so. Rather, it limited the exemption to one employed or applying for employment, rather than one seeking a license, a distinction that cannot be ignored." Id. at *6.

This court adopts the reasoning in Dudley, since it comports with accepted principles of statutory construction. "[W]here a statute creates provisos or exceptions as to certain matters the inclusion of such provisos or exceptions is generally considered to deny the existence of others not mentioned." McKinney's Cons Laws of NY, Book 1, Statutes § 240, at 412-413; see Matter of Jewish Home & Infirmary of Rochester, N.Y. v Commissioner of New York State Dept. of Health, 84 NY2d 252 (1994). Since the Legislature provided that membership in a law enforcement agency removes a person from the protections of Correction Law §§ 752 and 753, but did not provide that the issuance of a license to a nonemployee removed such protections, the latter cannot be implied or presumed. The court thus concludes that the petitioner was not a member of a law enforcement agency.

Consequently, the DOC was obligated to consider all of the relevant factors enumerated in Correction Law §§ 752 and 753.

C. THE DOC'S DETERMINATIONS

Although the DOC suggests in its opposition papers that it considered some of the statutory factors in making its initial determination, the record of the initial decision here reveals that the DOC did not consider any statutory factors, but simply revoked the petitioner's license based on his 1980 conviction. Moreover, the affirmance by the DOC appeal board is completely devoid of explanation. The DOC's so-called "revised criteria" for revocation, which are only considered upon an administrative appeal, completely omit 5 statutory factors.

Here, the DOC committed an error of law in concluding that Correction Law §§ 752 and 753 were not applicable to the revocation of the petitioner's security license. It thus rendered a determination that was arbitrary and capricious, inasmuch as it concededly failed to consider all of the statutory factors it was required to consider before revoking the license. The petition must thus be granted, the DOC's determinations annulled, and the matter remitted to the DOC for further proceedings, including a new discretionary determination after a full consideration of all of the factors enumerated in Correction Law §§ 752 and 753.

The court notes that, inasmuch as the matter is being remitted to the decision-making agency for a new discretionary determination, this paper constitutes an order, not a judgment. See Matter of Mid-Island Hospital v Wyman, 15 NY2d 374 (1965); Matter of Clermont Tenants Assn. v New York State Div. of Housing & Comm. Renewal, 73 AD3d 658 (1st Dept. 2010); Matter of Valentin v New York City Police Pension Fund, 16 AD3d 145 (1st Dept. 2005).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED that the petition is granted, the determination of the respondent New York City Department of Correction dated November 20, 2015, is vacated and annulled, and the revocation of the petitioner's security license is vacated and annulled; and it is further,

ORDERED that the matter is remitted to the New York City Department of Correction for further proceedings, including a new determination in accordance herewith; and it is further,

ORDERED that the respondents are directed, pending the new determination, but no later than 30 days after the date of this

order, to reinstate the petitioner's security license and grant him access to inmates detained on Rikers Island so as to allow him to engage in his profession as a credentialed alcoholism and substance abuse counselor.

This constitutes the Decision and Order of the court.

Dated: 5/4/17

ENTER:

J.S.C.

HON. NANCY M. BANNON